REGULATORY REFORM—VOLUME IV

CONSUMER PRODUCT SAFETY COMMISSION
NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION
FEDERAL TRADE COMMISSION

HEARINGS

BEFORE THE

SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS

OF THE

COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE
HOUSE OF REPRESENTATIVES

NINETY-FOURTH CONGRESS

SECOND SESSION

CONSUMER PRODUCT SAFETY COMMISSION
JANUARY 30 AND FEBRUARY 19, 1976

NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION
FEBRUARY 27, 1976

FEDERAL TRADE COMMISSION
MARCH 29 AND APRIL 24, 1976

Serial No. 94–83

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[1] Resigned from committee April 8, 1976.
[2] Appointed to committee April 13, 1976.
[3] Appointed to committee Jan. 27, 1976.
[4] Appointed to subcommittee Feb. 4, 1976.

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REGULATORY REFORM—CONSUMER PRODUCT SAFETY COMMISSION

FRIDAY, JANUARY 30, 1976

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS,
COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE,
Washington, D.C.

The subcommittee met at 10 a.m., pursuant to notice, in room 2322, Rayburn House Office Building, Hon. John E. Moss, chairman, presiding.

Mr. Moss. The subcommittee will be in order.

Today, the subcommittee opens the first of a series of regulatory reform–oversight hearings regarding nine of the agencies coming, in whole or in part, within the jurisdiction of the Interstate and Foreign Commerce Committee.

These hearings have been developed through an analysis of subcommittee questionnaire returns and supplementary documentary material from the agencies covered, staff interviews of agency officials, and of course, a review of the statutes and Executive orders under whose authority each agency operates.

The subcommittee has suggested that each agency head prepare a 20-minute fundamental policy statement in a common format highlighting the agency's public and consumer protection mission, the extent of public and consumer participation in the regulatory process, what deregulation or revised regulation might be needed, and comprehensive agency compliance and enforcement information for the last complete fiscal year, 1975.

Before we can finally recommend new or revised regulatory authorities or powers, we must have a clear idea of the extent of regulatee compliance with existing legal requirements.

Since the record we are compiling today and through this series will be one of the principal sources from which the subcommittee regulatory reform report and legislative recommendations will be drawn, the Chair would ask that the record of hearing remain open for 10 days for supplementary statements by the Commissioners and material the subcommittee may request from the agencies or outside experts. Without objection, that will be ordered.

At appropriate places in the record of hearings, relevant staff studies, questionnaire returns, and other documentary material will, if there is no objection, be included.

Hearing no objection, the material is so included.

Turning to the Consumer Product Safety Commission itself, I first wish to express my deep concern about indiscriminate "deregulation

through budget slashing" in general, and the fiscal year 1977 administration recommendation for the CPSC in particular. The Congress made provision for the CPSC to submit its budget requests concurrently to the Congress and to the Office of Management and Budget. President Ford, unfortunately, recommended a negative budget for the CPSC in fiscal year 1977: $37 million as opposed to the CPSC's modest $41.1 million request (scaled down from an earlier year 1977 request of $54.9 million). The President's recommendation, if approved, will mean that there will be fewer inspections for compliance and consequently more product injuries; regulatory development will be impeded; and the normal degradation through time of the CPSC's product injury information system—the brain of the agency—will be aggravated. The President's fiscal year 1977 budget simply fails to take into account both the fact of inflation and the fact that the CPSC will, we trust, have more standards to enforce in fiscal year 1977.

It is fitting that we begin our regulatory reform–oversight series with the CPSC—the newest of the regulatory commissions. (Monday morning the subcommittee will review certain operations of the oldest regulatory agency, the Interstate Commerce Commission.)

In testifying before the Senate Commerce Consumer Subcommittee nearly a year ago, Commissioner Franklin said of the Commission (then 2 years old): "I think we are now at the end of the beginning. The Commission's next 2 years must emphasize results."

Now, 1 year later, and almost 3 years after the establishment of the Commission, we will want to examine exactly that—results. Today, therefore, the subcommittee will inquire into the pace of standard setting, manufacturer notification, "openness," and information collection.

The CPSC's first Chairman, the Honorable Richard Simpson, and one of its Commissioners, Constance Newman, will be leaving that agency very shortly. Thus, we shall be eager to get the benefit of their experience while it is fresh in their minds—and we also solicit the views, comments, and questions of Commissioners Franklin, Kushner, and Pittle.

Perhaps equally important, I should like to say this morning how highly the subcommittee and its staff value the contribution of the career professionals who in the long run will determine whether the CPSC will be an effective force for consumer protection.

I believe that today's hearing will serve a useful and constructive purpose. For whatever the subcommittee's criticisms or recommendations, we are united with you in pursuit of a common goal—the substantial reduction in consumer product-caused deaths and injuries.

Now, before hearing your statement, Mr. Chairman, I wonder if all of the members of the Commision and staff present who will be testifying will stand and be sworn.

Do you and each of you solemnly swear that the testimony you are about to give this subcommittee will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. SIMPSON. I do.

Ms. NEWMAN. I do.

Mr. KUSHNER. I do.

Mr. PITTLE. I do.

Ms. FRANKLIN. I do.

Mr. BROWN. I do.

Mr. PARENT. I do.
Ms. FRANKLIN. Commissioner Barbara Franklin.
Mr. KUSHNER. Commissioner Lawrence Kushner.
Mr. BROWN. Michael Brown, General Counsel.
Mr. SIMPSON. Dick Simpson, Chairman.
Mr. PARENT. Stanley Parent, Executive Director.
Ms. NEWMAN. Commissioner Constance Newman.
Mr. PITTLE. Commissioner David Pittle.
Mr. Moss. Thank you. Mr. Chairman, I am pleased to welcome you.

I realize fully that you have many problems in launching an agency as significant as this. I think from that experience we will be able to gain helpful information.

We will be pleased to hear from you.

TESTIMONY OF HON. RICHARD O. SIMPSON, CHAIRMAN, U.S. CONSUMER PRODUCT SAFETY COMMISSION, ACCOMPANIED BY CONSTANCE B. NEWMAN, VICE CHAIRMAN; LAWRENCE M. KUSHNER, COMMISSIONER; R. DAVID PITTLE, COMMISSIONER; BARBARA H. FRANKLIN, COMMISSIONER; MICHAEL A. BROWN, GENERAL COUNSEL; AND STANLEY R. PARENT, EXECUTIVE DIRECTOR

Mr. SIMPSON. Thank you, Mr. Chairman. I am pleased to be here. It is the beginning of the end, for me, at least.

Mr. Chairman, I am pleased to appear before this subcommittee today to report on the progress and the achievements of the Consumer Product Safety Commission; to respond to your questions together with my colleagues; and to give you my personal views, as the outgoing Chairman of the Commission, on the strengths and weaknesses of the Consumer Product Safety Act. The presentation today has been generally structured along the lines suggested by the subcommittee. The outline I will be following is shown on the first chart.

CHART 1

OUTLINE OF INTRODUCTORY REMARKS

Agency mission.
Public protection mission—accomplishments.
Public and consumer participation in the regulatory process.
Need for revised legislation.
Compliance policy and program.
Measures of effectiveness.
Summary—A 5-year plan.

Agency mission: The enactment of the legislation to create the CPSC was the culmination of 10 years of congressional effort to secure the consumer's right to safety in the marketplace. The specific mandate of the Commision, as spelled out in the Consumer Product Safety Act, is detailed on chart 2.

CHART 2

MISSION OF THE CONSUMER PRODUCT SAFETY COMMISSION

To protect the public against unreasonable risks of injury associated with consumer products;

To assist consumers in evaluating the comparative safety of consumer products;

To develop uniform safety standards for consumer products and to minimize conflicting State and local regulations; and

To promote research and investigation into the causes and prevention of product-related deaths, illnesses, and injuries.

The authority of the Commission comes from five acts, the enabling statute, the Consumer Product Safety Act, plus the four transferred acts: The Hazardous Substances Act, the Refrigerator Safety Act, the Flammable Fabrics Act, and the Poison Prevention Packaging Act.

The scope assigned by the Congress to this Commission is tremendous. There are well over 10,000 consumer products clearly subject to Commission jurisdiction; numerous others where jurisdiction is not so clear; and more than 2 million manufacturing, distributing, retailing, and importing firms which fall within our area of responsibility.

The size of the safety problem is equally impressive. Conservative, accepted estimates indicate that there are approximately 20 million product-associated injuries per year with an estimated 30,000 of these resulting in death.

Before I am accused of misstating or overstating the injury estimate, let me hasten to add that not all, or even a majority, of these are believed to be product-caused injuries. Most experts place the product-caused, or "standards-preventable" portion at somewhere between 15 per cent and 25 per cent of the total product-associated injury figure.

I will discuss the significance of these data further in the concluding summary section.

Public protection mission: In the guidance provided by the subcommittee, a request was made for a citation of "the outstanding success story in the last 5 years". Although the Commission is not quite 3 years old, it has had, in my view, several outstanding successes. Chart 3 graphically illustrates some of these accomplishments.

Chart 3a

SELECTED MAJOR ACCOMPLISHMENTS
CPSC 1973-1974

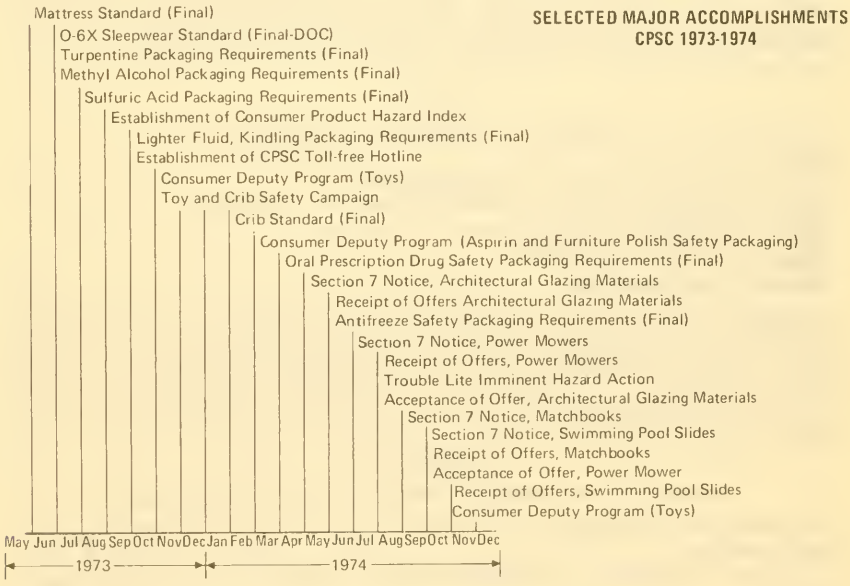
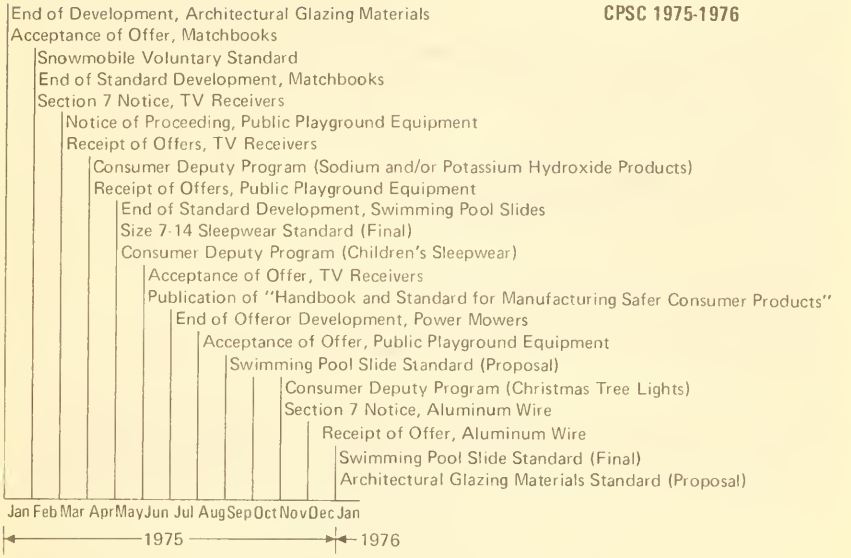


Chart 3b

SELECTED MAJOR ACCOMPLISHMENTS
CPSC 1975-1976



I will put those back up, if you wish to ask questions.

Your set of charts also includes those items.

The charts speak to regulatory action, to standards development programs. The list does not include significant policy formulation, et cetera. I am sure we will get into these in the questioning.

We have successfully implemented a prototype openness policy for Federal agencies, as well as an innovative standards development process as required by section 7 of the Consumer Product Safety Act.

We have also won several landmark decisions establishing favorable legal precedents, a necessity for a new regulatory agency. Under the Consumer Product Safety Act, an attempt to stay the collection of product ingredient data under our statutory authority to issue general or special orders was denied on November 18, 1975, by the U.S. Court of Appeals for the District of Columbia Circuit; our ability to utilize consumer deputies or consumer volunteers in attempting to alert retailers and distributors to possible section 15 violations was similarly upheld by the U.S. Court of Appeals for the Second Circuit and our authority under the Federal Trade Commission Act to issue to a manufacturer a general order of access for purposes of inspection under the Flammable Fabrics Act was recently upheld. To our knowledge, this was the first time such a broad access order has been used or has been tested since the Flammable Fabrics Act was passed in 1953.

Were I to single out one activity, however, which, in terms of public protection, could be cited as a "success story," it would, of necessity, be the implementation of section 15 of the Consumer Product Safety Act. Chart 4 highlights some of the section 15 activity.

CHART 4

THE MOST ACTIVE SECTION OF CPSA—SECTION 15

Efficient

2 to 10 notices of defect processed weekly
100 cases monitored simultaneously.
30-day response.
Minimum of legal intervention.

Comprehensive

Positive action compliance program.
10,000 injury reports reviewed annually.
Examines products for defects.

Effective

24 million products (360 cases to date).
3.7 million products corrected.
4,000 technical inquiries answered.

Sample of 29 cases indicates that CPSC actions may have prevented 20 deaths and 300 injuries.

As you know, section 15 places a requirement on manufacturers, distributors, retailers, and importers to report to the Commission whenever they have reason to believe that products either fail to conform to an applicable consumer product safety standard or contain a defect which could create a substantial product hazard.

The Commission has, in my view, efficiently handled large volumes of work related to substantial product defects from its earliest days. In fact, more than 350 reports have been acted upon to date, involving more than 24 million items, and resulting in the correction of almost 4 million of those items.

An indication of the impact and importance of the section can also be found in the fact that almost 4,000 technical inquiries have been received by the Commission requesting advice about section 15—many raising questions of design and manufacturing practices.

We encourage all subject to our jurisdiction to ask for technical guidance or technical advice and legal guidance or legal advice. We are glad to provide it.

We have a published policy for handling section 15 cases, and I am pleased to report that the process generally works smoothly and effectively, with an extremely high percentage of affirmative action and cooperation on the part of the affected companies.

The last item on chart 4 is a quick study we did of a sample of 29 cases. These are 29 cases of the 50 where we had some knowledge that some injuries had occurred. Of these, our assessment indicates that the action under section 15 in these 29 cases prevented 20 deaths, perhaps 300 injuries.

But, that is not the story of section 15 because in most cases what has happened is that our notices have been prior to any injury occurring in the marketplace, so that we have absolutely no way of counting injuries that did not occur.

For the 4 million items that have been corrected, you can draw your own conclusions.

While section 15 has been an extraordinarily effective feature of the act, another feature, section 10, which involves procedures for petitioning the Commission to undertake regulatory action for the issuance of a consumer product safety rule, has presented the Com-

mission—particularly in these days of budgetary constraints—with an anomalous situation.

Proceeding from the requirements of section 10, the first petition the Commission received requested the development of a safety standard for swimming pool slides. The first proposed safety standard under the Consumer Product Safety Act—a swimming pool slide standard—has proceeded through the required steps of evaluation of the existing data to support the petition; the Commission's decision to grant the petition because we believed it presented an unreasonable risk under the statute—if we believe that, we must grant the petition and immediately start action—the development of the rule through the use of an offeror proceeding; the evaluation of the proposed rule; and the recently published final standard.

In my opinion, in any rational priority order of regulation, I would say the swimming pool slide standard, while justified and probably mandated by our enabling statute, has been the least productive agency proceeding.

I shall make a personal recommendation on a change to the petition process when discussing chart 6—"Need for Revised Legislation."

Chart 5 leads us into a discussion area where I believe this Commission has been both innovative and forward looking.

CHART 5

PUBLIC AND CONSUMER PARTICIPATION IN THE REGULATORY PROCESS

CPSC openness policy—liberal interpretation of Freedom of Information Act.
Section 7 participation.
Advisory committees.
Consumer deputy program.
Consumer sounding board support.
Hotline, et cetera.

As I have stated on other occasions, the Commission's openness policy has proven to be extremely successful, both from the point of view of agency credibility, and because it provides a very big opportunity for public scrutiny and participation in the activities of the agency. As a companion to our openness policy, the Commission has adopted an extremely liberal interpretation of the Freedom of Information Act. An interpretation which generally requires release of all material requested, notwithstanding the available withholding exemptions in the act. In other words, we interpret the FOI Act as just that, as Congress intended, a freedom of information act, not a protection of information act.

One point I would raise in this regard is the apparent conflict between section 6(b) of the Consumer Product Safety Act, which requires a 30-day delay and notification to an affected manufacturer if materials by which he can be identified are to be released to the public, and the requirement under the Freedom of Information Act that the requesting party be notified within 10 days of request of the availability of the desired materials.

The Commission has been dealing with this problem by interpreting section 6(b) as applying only to affirmative disclosures by the Commission, and the Freedom of Information Act as applying to passive release of information. We are now involved in what appears to be protracted litigation on this subject in two cases, and a third case was just filed against us this past Monday.

I believe consideration should be given by the Congress to a resolution of this conflict by modification or clarification of section 6(b) of the Consumer Product Safety Act, that the clarification should be along the lines that the Commission had adopted, that is, 6(b) only applies to affirmative releases.

Mr. Moss. Mr. Chairman, could you have suggested language submitted to us? We will give it careful consideration.

Mr. SIMPSON. I will be very pleased to do so.

I believe that is what the Congress probably had in mind.

If you adopt any other interpretation of section 6(b), if you encompass it in the Freedom of Information Act, it would mean we must verify the accuracy of every piece of information before it can be released.

If a consumer complaint says this product is bad and we have to verify whether it is bad, we would never be able to release information.

Mr. Moss. As the primary author of both acts, I am inclined to agree with you.

Mr. SIMPSON. I am well aware of that.

[The following proposed amendments were received for the record:]

AMENDMENTS TO THE CONSUMER PRODUCT SAFETY ACT PROPOSED BY RICHARD O. SIMPSON, CHAIRMAN, CONSUMER PRODUCT SAFETY COMMISSION

PUBLIC DISCLOSURE OF INFORMATION

Section 6(b) of such Act (15 U.S.C. 2055) is amended to read as follows:

(b)(1) Except as provided by paragraph (2) of this subsection, not less than 30 days prior to the disclosure of information prepared by the Commission for distribution to the public (unless the Commission finds out that the public health and safety requires a lesser period of notice), the Commission shall, to the extent practicable, notify, and provide a summary of the information to, each manufacturer or private labeler of any consumer product to which such information pertains, if the manner in which such consumer product is to be designated or described in such information will permit the public to ascertain readily the identity of such manufacturer or private labeler with a reasonable opportunity to submit comments to the Commission in regard to such information. The Commission shall take reasonable steps to assure, prior to its public disclosure thereof, that information from which the identity of such manufacturer or private labeler may be readily ascertained is accurate, and that such disclosure is fair in the circumstances and reasonably related to effectuating the purposes of this Act, it has made public disclosure of inaccurate or misleading information which reflects adversely upon the safety of any consumer product, or the practices of any manufacturer, private labeler, distributor, or retailer of consumer products, it shall, in a manner similar to that in which such disclosure was made, publish a retraction of such inaccurate or misleading information.

(b)(2) Paragraph (1) shall not apply to requests for information under section 552, title 5, United States Code; Paragraph (1) (except for the last sentence thereof) shall not apply to the public disclosure of (A) information about any consumer product with respect to which product the Commission has filed an action under section 12 (relating to imminently hazardous products), or which the Commission has reasonable cause to believe is in violation of section 19 (relating to prohibited acts), or (B) information in the course of or concerning any administrative or judicial proceeding under this Act.

Mr. SIMPSON. Section 7 of the Consumer Product Safety Act, the so-called offeror section, requires the Commission to prescribe regulations governing development of consumer product safety standards which, among other provisions, require "notice and opportunity by interested persons (including representatives of consumers and con-

sumer organizations) to participate in the development of such standards." The Commission has prescribed such regulations.

We require all successful offerors to bring consumers to the standards-development committees and to solicit their opinions on costs, convenience, and other features of the rule under development. This participation has, in our view, been quite successful. To determine whether or not the procedure was viewed as meaningful by the consumers themselves, the Commission recently invited all consumer participants in the first four section 7 proceedings to come to Washington and discuss their experiences and give us their views of the process. The response indicated that the consumers felt they did have a meaningful and significant impact, and they thought it was significant and applauded the process.

I believe the committee has been provided a transcript of that as well as a transcript of a similar meeting where we called the other representatives, the industry representatives, together and solicited their views, also.

I might say both of them have the same comment that when they sat down they were very skeptical of the motives. The consumers were skeptical of the motives of industry, and vice versa.

By and large, both groups when they left the proceeding had gained the respect and admiration for the contribution of the other parties.

Consumer voices are also heard in the Commission advisory committees. We have fought the advisory committee syndrome in which you see the same persons on the advisory committees all over town. At the outset, we sought candidates for appointment to these committees through press releases with wide national circulation as well as through Federal Register notices. The response has been excellent. The Product Safety Advisory Council, as specified by the Consumer Product Safety Act, is composed of one-third consumers. By Commission policy, the advisory committees required by the Flammable Fabrics Act and the Poison Prevention Packaging Act are composed of one-half consumer representatives.

There is no political clearance required for these. They are selected only on merit. We have a large standing list of people who would like to become members.

We have also established an innovative policy which permits use of consumer volunteers to assist in specific surveillance operations. We call these consumer deputy programs. (The word "deputy" in this case means volunteer, not vigilante as some have alleged.) Local volunteers, local citizens, these are individual citizens, members from the retirement community, all walks of life; they are solicited through area offices, are trained by Commission staff, and are utilized to survey retail shelves; to provide information to retailers on Commission regulations; and to collect information on products in the marketplace. Six programs, utilizing 3,000 volunteers visiting approximately 8,200 establishments, have been successfully completed in the last 2 years.

We have also recently provided a funding mechanism to assist in the expansion of, and to secure feedback on, specific issues from a new concept, called the consumer sounding boards, a nationwide network of representative consumer panels convened to provide opinion input on specific questions.

The original idea was conceived by Margaret Dana, consumer consultant, who, I think, is known to the members of this committee.

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For instance, we are presently seeking "soundings" on the projected costs associated with the power mower standard currently in development.

Additionally, our successful consumer hotline, consumer outreach programs from our field offices, and the right of the individual consumer to petition the Commission under section 10, all help to assure more than token consumer involvement in the work of this agency.

Legislative recommendations: I would like to turn now to chart 6, the need for revised legislation, and discuss some of the other areas in which I believe changes would be beneficial.

CHART 6

NEED FOR REVISED LEGISLATION

Independence versus accountability.
Public disclosure of information—Section 6 versus FoI Act.
Offeror process—Section 7.
Petitions—Section 10.
Expansion of enforcement capability—Sections 19, 20, 21, 22, 27.
Budget process—Section 27(k).
Abolish transferred acts.
Jurisdiction clarification—Cigarettes and bullets.
Collegial body—Decisions and management.

These comments are based on my own personal observation and experience in the past 3 years as Chairman of this agency. Before I get into specifics, let me point out basically that I believe the CPSA to be quite sound. I do, however, believe that some changes should be seriously considered.

Many people believe that the so-called independent agencies constitute a "headless" fourth branch of Government, a branch that is without adequate checks and balances. I, personally, believe such concern is well founded, and I would urge that this committee, as part of the overall process of regulatory reform, reconsider whether a regulatory function is more properly assigned to an independent commission, like CPSC, or to an executive branch agency, like FDA.

When I, as Chairman, after almost 3 years—and I think my views are shared by the chairmen of the other independent agencies—cannot honestly tell you whether the CPSC is part of the legislative or executive branch, then there is, at a minimum, some confusion, and I am not alone. My personal questioning of Members of both the House and the Senate on this same question shows them about equally split. Such a situation makes for obvious accountability problems in the future and should be clearly resolved by the Congress.

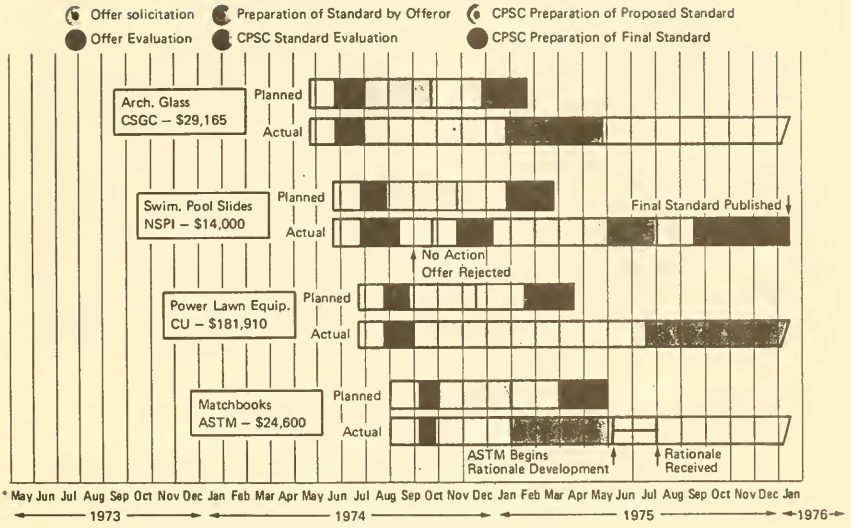
I previously touched on the second item on chart 6, the CPSA section 6 versus the FOI Act controversy, and I will not dwell any further on this subject. I would be glad to elaborate further in the questioning process, should you desire.

Section 7 of the Consumer Product Safety Act—the offeror provision—I think the Congress should be applauded for the way it mandates meaningful public participation in the standards writing process. The Commission has previously indicated to the Congress that more flexibility is needed in the various time schedules contemplated by the CPSA for various stages of this process.

Our experiences with some of the early offeror standards developments are shown graphically in chart 7.

Chart 7

STANDARD DEVELOPMENT UNDER SECTION 7
PLANNED – ACTUAL



*Actual dates may disagree with Federal Register Publication dates

The top bar in each of those cases represents the time schedules as outlined and contemplated in the Consumer Product Safety Act.

Just below each one of those is what has actually happened.

If you look at the blue section, you will notice in all cases the proposed time for the offeror to develop the standard substantially exceeded the 120-day statutory times (except in the bookmatch case, and in that instance the job ultimately was not completed in that period). For example, in the TV safety standard development currently underway, we allowed 150 days plus a recent 250-day extension for the offeror development period; and recently, I think, unanimously approved, at least the majority approved, a 250-day extension of the time for the offeror to develop a standard.

What we are saying is that we think flexibility is needed, and the time to develop the standard needs to be tailored to the complexity of the product you are developing.

Another characteristic feature of the present process is the seemingly unusual amount of time for the Commission to complete the process after the offeror has submitted his work effort.

One observation and criticism is that the Commission must obviously be mismanaged but that is not true.

To highlight this, I would draw your attention to the gray and tan areas on the chart. The gray represents the time required for the Commission to evaluate the work submitted by the offeror and the tan reflects the time required for the Commission to rework the offeror's submission so that it can be published as a proposed standard.

Section 7, as mandated by the CPSA, contemplates three separate and distinct phases to the standards development process:

Step 1: The Commission finding of risk, together with a notice in the Federal Register detailing how the product is involved with the user.

Step 2: The selected offeror takes his injury date and attempts to write a standard which reasonably addresses the identified risks.

Step 3: The Commission evaluates the offeror's work effort and makes changes as required.

I, personally, believe, as long as we follow that process, we can always expect delay and confusion to be a product or byproduct of the offeror process as in the CPSA. I think you will always see these time schedule disparities, and you will always see confusion because, in my opinion, the real world standard writing process is not partitioned into three distinct and separate phases. As a matter of fact, in standards writing, there is a continuous process involving frequent back and forth excursions between injury data review, examination of possible technical solutions, and review of those solutions, when writing a standard. Each phase may be touched on up to 10 times, or more, in a completed iterative process, before arriving at a standard.

My concern also is that the confusion may result in an amendment at some time in the future that will destroy the process.

I would like to suggest something where I think you can have your cake and eat it, too.

In order to retain what I believe to be the very positive feature, and I think the key feature, of the section 7 process, which mandates meaningful public participation in the process while at the same time reducing the time, cost, and confusion to arrive at a standard, I would suggest that section 7 needs revision that will place the Commission in the role of the offeror or the standards manager, if you will, in all of the section 7 standards.

Such a change would make meaningful and possible the necessary excursions between the parties involved. It is what is now a process involving three distinct phases and doing so while retaining the remaining plus features of the meaningful private party involvement.

If the Commission is to be an offeror, the same requirements which dictate participation by outside parties should be imposed on the Commission.

At this point, I would like to turn my attention to section 10, in many ways the beginning of the regulatory process for the Commission. I strongly believe in the right of petition by citizens. I further believe that the exercise of that right by interested parties is not unmeaningful but a very valuable communication link for the Commission. I suggest, however, that some minor changes in the language of the act would improve this very meaningful public service tool and aid the agency in meeting its mandate, as well.

Chart 8 graphically shows the workloads which have been generated by the petition process. As you will note, 104 of the 226 petitions received by the agency, or nearly half, have been denied, following the procedure outlined in the act.

CHART 8

PETITIONS ACTIONS THROUGH DECEMBER 1975

Act	Received	Granted	Denied	Withdrawn	Pending	Other
CPSA	58	10	17	1	26	4
FFA	45	6	24	1	11	3
FHSA	49	4	22	2	19	2
PPPA	74	15	41	7	9	2
Total	226	35	104	11	65	11

Although the resources that are required to deal with these denied petitions are very significant, there is no tangible output or regulation to show for the invested effort. Under the act, as it now stands, the Commission is subject to court suit if the petitioner does not agree with our determination that the product does not present an unreasonable risk and the court can instruct the Commission to commence a section 7 rule development proceeding.

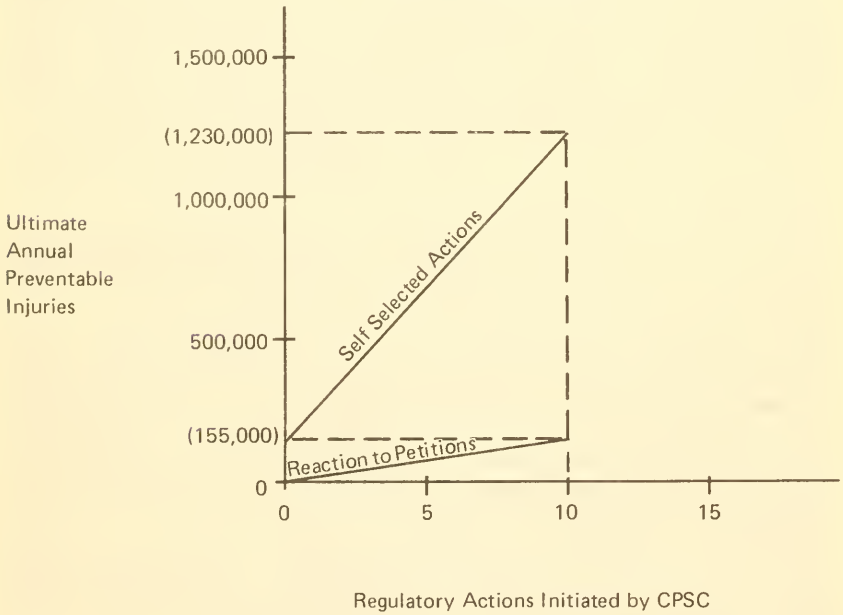
Such a proceeding, by its very nature, makes it incumbent upon the Commission to fully study and assess each petition despite the fact that preliminary decisions could undoubtedly be made relative to the substantive nature or the relative impact that such a petition would have.

In other words, you could probably, relatively early, place that petition in a rational priority setting process.

Chart 9 gives a little further insight of what I am talking about.

Chart 9

COMPARISON OF CPSC ACTIONS – SELF SELECTED vs. PETITION RESPONSE



If you take the 10 petitions which have been granted so far by the Consumer Product Safety Commission, our injury data tells us we can address a total of approximately 155,000 annual preventable injuries from the rules that will flow out of that.

Using the same kind of analysis, if, instead of working on those 10, the Commission were to select 10 other projects in what we believe to be a rational priority setting; that is, the Commission working on the highest rate of injury, approximately 1.2 million annual preventable injuries might be addressed.

To me, it is certainly of questionable public interest when limited resources and time are overwhelmingly spent on lower priority petition generated effort as compared to an effort specifically directed toward more comprehensive problems.

I might say that this also goes hand in hand with the level of resources.

If the Commission had a higher budget, we might well be able to do both in some meaningful balance.

To implement the petition process more effectively and efficiently, I believe, at a minimum, the Commission should have more flexibility in the 120-day statutory period wherein we must act on the petition. A longer period should be allowed if the Commission can make and support a finding of good cause which would be based on the complexity of the issues involved and ours as well as the public's understanding of the problems.

As an example, if we get a petition to ban all aerosols because of the fluorocarbon ozone problem, that is a very complex problem which is going to take a lot more time to analyze than the petition, say, to write standards on widgets.

I think that the 120-day period, much like it is in the section 7 process, should contain a provision for a good cause finding; and in fact, I believe that that process should be amended to allow the Commission to deny a petition even where unreasonable risk exists if the Commission can also make a finding that you are getting into a situation such as outlined in chart 9, where you can find that your resources could be directed at higher unreasonable risks.

In other words, allow us to deny it even though an unreasonable risk exists.

At least, in my reading of the present language there is only one criterion; if an unreasonable risk exists you must grant the petition. If we grant the petition, we must start the rulemaking, and I think that gets us into the problem of swimming pool slides.

If I may refer back to chart 6, the next item is expansion of enforcement capability. The question of enforcement powers is one which the Commission has already explored with Congress at length in prior hearings on the CPSC Improvement Act. The Commission has recommended, and in view of budgetary restraints, again renews the plea, that at a minimum two additional authorities should be available to the agency to provide maximum leverage of its limited enforcement resources.

First, the requirement in section 27 that the Commission work through the Attorney General in filing cases, in my opinion, has frustrated our ability to enforce, and I will not go into detail, but this committee is well aware of our views as expressed.

Additionally, we have asked for authority under section 22 to provide that where the Commission has made a formal finding through section 15 procedures that a product presents a substantial product hazard, we believe we should have authority to seize similar goods.

I have previously mentioned section 27(k), and I specifically now refer to the budget provision of section 27(k).

I would again urge this committee to take a look at the historical impact that section has had on the early growth, or perhaps the early nongrowth as has proven to be the case, of this agency. The CPSC has

never, in my mind, had the advantage of an adequate base budget. It has never received funding from the Congress which would permit it to reasonably address on its own initiative those candidates for regulation which score high on our priority list. We have found ourselves continuously in a reactive stance.

Last year, we estimated 75 percent or more of our activities were reactive as opposed to planned. I think that is the wrong balance. At what point the budget provision can be considered counterproductive is not easily detectable, and at what point the damage can be reversed is not easily predictable.

The section should be openly and fully examined in detail in retrospect, and if the budget system, and I am talking about the way the budgets are looked at by the Congress, by the committees of Congress, and by the administration, if that system is not able or willing to accept that kind of provision, then I would urge that you repeal that provision.

I am not going to talk about whether or not the whole thing is cause and effect, but let me just point out that if you compare the amount of funding available to this agency and to several other agencies in fiscal year 1976 and compare those with the President's request in 1977 for those same agencies, you find the following:

The CPSC's increase is 1 percent, slightly less than 1 percent. The next lowest increase is with the Federal Communications Commission, up 10 percent. The Federal Trade Commission, up 43 percent. The SEC, up 17 percent. The Civil Aeronautics Board, up 24 percent.

In total personnel allocations, we are zero percent increase, and every other agency is increased.

The next area I would like to discuss concerns the transferred acts, and the interreaction with the Consumer Product Safety Act. In many instances, in my view, it would be desirable, as well as in the public interest, for the Commission to proceed under the broader and more viable provisions of the CPSA in dealing with product hazards that are or would be subject to regulation by one of the transferred acts. However, section 30(d) of the Consumer Product Safety Act currently provides that we cannot do that, we must proceed under the transferred acts unless we can make a finding that the hazard cannot be reduced to a sufficient extent by action taken under one of those acts.

The key words are "eliminated or reduced to a sufficient extent," which legislative history indicates is limited to an evaluation of all aspects of the risk plus the remedial powers available to the Commission. Thus, we cannot decide to transfer that regulation to the CPSA based on such things as the time involved to obtain a regulation, the cost of the regulation to the consumer or to industry, as well as many other factors which one would want to include in the consideration of the total public interest.

The result has been both unnecessary confusion and unnecessary litigation. We are involved, for instance, in perhaps a dozen cases of litigation just on the bicycle standard alone. In my personal opinion, I see absolutely no persuasive public interest argument in favor of continuing the existence of the transferred acts, and I think the Congress should bite the bullet and abolish those acts, bringing the existing regulation and product coverage under the broader umbrella provisions of the Consumer Product Safety Act.

I think you should have done it when you passed the bill, but I understand the problems associated with it. I think now the time is right.

Speaking of "biting the bullet," that introduces the next legislative change on chart 6.

This Commission has been involved in protracted, confusing, and unnecessary litigation involving two products which almost everyone agrees were not intended by the Congress to be subject to CPSC jurisdiction—cigarettes and bullets. The surrounding controversy and public confusion, not counting the drain on our resources, has been extremely harmful to the Commission.

As a matter of fact, on the bullet petition we were ordered by a court to publish it. We received over 300,000 letters. It clogged our mail system, and well over 100 of those were personal threats on my life, I might say.

I urge the Congress to get on with it and clarify this jurisdictional question at the earliest possible date.

I think it has been extremely harmful. I might say also in both of those cases the Commission denied the petitions to regulate.

Subsequent lawsuits brought us back into the problem.

The last item on the chart is titled "Collegial Body—Decision and Management." As this committee is aware, regulatory bodies are either headed by a committee such as the case in this Commission or a single administrator as in the case of FDA and NHTSA. Both organizational forms have their obvious positive and negative features.

I have personally had previous experience in private life and some in the Commerce Department with the single administrator form of organization. The last 3 years has been my first experience with the collegial body or committee concept.

With all due respect to my colleagues, I am persuaded by the person who once observed, and I might well have been that person, that "if you must manage and make decisions by committee then the committee should have an odd number of members and three is too many."

I would urge this committee and the Congress as a whole to look very seriously, not facetiously but very seriously, at the pluses and minuses of both organizational forms when looking at overall regulatory reform initiatives.

My personal recommendation is that all commissions headed by committees should be abolished and the committees replaced by single administrators.

The subcommittee also expressed a particular interest in our compliance and enforcement operations. I will provide you with a brief review in chart 10.

CHART 10

CURRENT COMPLIANCE GOALS

Reduce time frame for case development.
Make transition from periodic random surveillance strategy to a selective product line surveillance strategy.
Test strategies to determine how to be more selective about inspections and litigation to obtain a high level of compliance at minimum possible cost.
Develop evaluation systems for measuring compliance effectiveness.
Establish positive legal precedents.

Obviously an agency consisting of a total of 890 people cannot begin to frequently inspect a marketplace where more than 10,000 consumer

products, over which this Commission has jurisdiction, are sold in more than 2 million establishments, also subject to our jurisdiction. Ideally I think most everybody would agree that a field office should visit each establishment subject to its jurisdiction perhaps at least once a year. Given the size of the Commission and the number of such establishments, we presently estimate that our present staffing level would only allow an inspector to visit each establishment approximately once every century. That is approximately once every 100 years.

I commend to you that the threat of inspection as a motivation for compliance is not good.

The question then is how does the Commission enforce its rules and standards and how does it safeguard the marketplace and therefore the consumer from unreasonable risks from consumer products. The numbers of products banned or seized, injunctions issued, civil actions initiated, or criminal prosecutions brought are in the final analysis not true measures of effectiveness but only indicators of effectiveness. The definitive measure of effectiveness is the number of injuries that are reduced by various actions taken by the Commission.

We have made a great deal, all of us, the Commission and staff, in our speeches and other public appearances of what we call motivational compliance. Very simply stated, in addition to the encouragement and information flow and answering inquiries, motivational compliance embodies the concept that the Commission will not hesitate to use all of the administrative and legal options at our command to achieve conformance with the applicable laws, rules, and regulations. Enforcement actions must be directed toward retailers, importers, distributors, private labelers, and manufacturers in such a way as to motivate compliance through consistent demonstration of the consequences of noncompliance.

This strategy becomes increasingly vital, given our limited funding and personnel. As a matter of fact, I haven't done the figuring out but if you were to structure the size of this agency so that the frequency of inspection was probably equivalent to that perhaps in the Department of Agriculture for meat inspection purposes I daresay we would be in the tens of thousands of people, not 890.

We are not recommending that, I don't recommend that. In fact, as a result of our inability to receive the level of funding that I believe essential to accomplish our mission, what is now an inadequate level of inspection is going to be reduced even further in 1976 and in 1977.

I have already ordered a freeze on recruitment or hiring in the field with a corresponding transfer of those positions to headquarters to support the required standard development program and related activities.

We are also slow in writing standards. Obviously before you enforce you write standards.

Relatively speaking, even with that level of frequency inspection I find it necessary to take the positions back into headquarters.

We have, however, not wholly been without success. In fact, I am very proud of our compliance activity with the resources available.

We have been successful in reducing the average time frame for case development from over 1 year to what is now 3 to 6 months. We believe an important element of our future compliance effort is our shift from a periodic random surveillance to a systematic surveillance program

targeted along specific product lines. Thirteen targeted surveillance programs constitute the bulk of our last 18 months compliance work. We anticipate that shortly over 50 percent of our effort in the field will be preprogramed along a kind of pretargeted inspection effort.

The bulk of our surveillance activities are accomplished by Commission field staff but valuable outside resources have been utilized through State contracts; some, where we can get the voluntary assistance and we have received a lot of that, some we have paid for—we have not only the people problem but funding problem—and invaluable assistance from the previously mentioned consumer deputy program volunteers.

For those there is absolutely no funding, no reimbursement to those individuals.

As a part of its compliance and enforcement program the Commission has also developed needed short-term response procedures where we are involved with a substantial product hazard.

We characterize those as an emergency.

On the more positive side I believe it would add another dimension to our compliance effort if affected companies who are now supposed to be complying with our existing standards were not foreclosed from citing that demonstrated compliance in the course of civil product liability actions.

At present this is specifically foreclosed by the language of section 24(a) of the Consumer Product Safety Act.

I, personally, recommend that this language be repealed.

I consider it very important that we be able to evaluate compliance under the Commission's statute. I know this committee also considers it important. I would like to call your attention to chart 11 which outlines the activities that the Commission has been pursuing for the last 18 months to achieve the ability to compile and use information such as you see displayed on this chart.

CHART 11

COMPLIANCE PROGRAMS

	Estimated size of industry—Number of firms	Number of firms inspected subject to program	Number of firms in violation	Number of firms in compliance	Compliance rate of firms inspected (percent)
FFA:					
Sleepwear	300	94	31	63	67
Mattresses	1,500	350	151	199	57
Continuing guaranties	4,000	[1] 63	30	33	52
Cease-and-desist order	180	151	4	147	97
Carpets	190–900	58	8	50	[2] 86
PPPA:					
Aspirin		168	10	158	94
Drain cleaners		35	16	19	54
Petitioners		9	3	6	67
FHSA:					
Screening program (8 categories of products)		300	113	217	66
Lead in paint		141	([3])	121–132	86–94
Toys		137	17	120	88
Cribs	10	10	2	8	80
Fireworks		[4] 198	0	198	100

[1] Program still in progress.
[2] Not statistically structured.
[3] 9 confirmed, 20 possible.
[4] Attempted buys banned fireworks.

I endorse the concept of annual compliance reports, the obligation to report to the Congress by agencies, not only for use in agency oversight but for use by agency management as a review of compliance activities.

Again, if you take a look at that chart and if you believe the level of resources is as I have been telling you, then I think it becomes obviously important, again, why the Commission believes to achieve motivational compliance, which is the only strategy practically available to us, we must close the loop and be able to file cases where we find violations once we have screened those cases.

In evaluations of our program the primary measure of effectiveness utilized by the Commission is the degree to which our programs reduce the frequency and/or the severity of the injuries that are associated with consumer products. It is very difficult to estimate this with a high degree of precision. It is easy to ask for it. However, the data bases have been implemented fully only recently and did not exist prior to the establishment of the Commission.

A more important difficulty and one which I think is often overlooked in measuring effectiveness is that most Commission actions do not have a large immediate effect in terms of numbers of injuries reduced. For instance, a great deal of work has been done on standards and other programs which have not yet been finalized so the effect has not started to occur but the work effort has gone on. As an example, manufacturers will have 1 year in which to comply after promulgation of the architectural glazing standard. However, even when the standard becomes effective, all architectural glass in the country will not comply because the existing architectural glass has a very long product life and it takes years before new production replaces that in the marketplace. It is obvious that the effectiveness of the standard accumulates over a long period of time.

Because of these factors the best measure of our overall effectiveness must be obtained from predictive techniques.

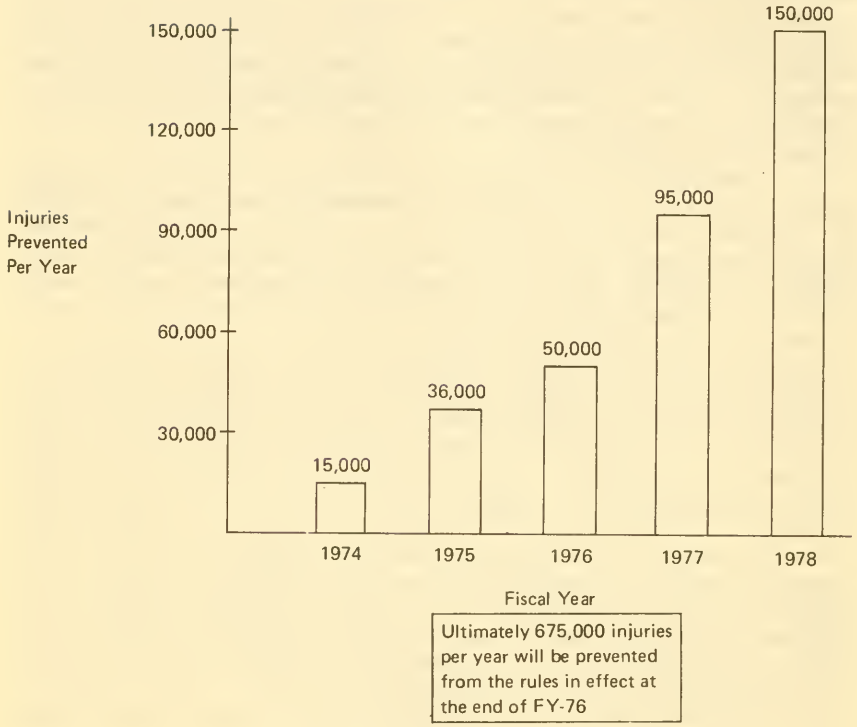
I am talking about computer modeling and the ability to use that kind of techniques to predict, to take into account the total population of products in the marketplace, the rate of production in the marketplace, therefore the rate of replacement, the probability of injuries, the probability of the level of compliance.

All of those things go into fairly complicated models we call predictive techniques.

Chart 12 shows the example of the output of some of those techniques. Chart 12 presents our estimates of the number of annual injuries that were prevented or will be prevented by the regulations that will be in effect by the end of the current fiscal year.

Chart 12

ESTIMATED NUMBER OF ANNUAL INJURIES PREVENTED DUE TO RULES IN EFFECT BY END OF FY 1976



We estimate that if this Commission were going out of existence at the end of fiscal year 1976 and if the compliance with the regulations were to continue at a reasonable level of compliance, that in 1976 we would have prevented 50,000 injuries, in 1977 if we were out of existence we would still have prevented 95,000 injuries and the cumulative total when the products subject to those regulations replace the products in the marketplace that have been worn out, the cumulative effect of those standards which will be in effect by the end of this year we estimate at 675,000 injuries per year that will have been prevented.

This measure of effectiveness does not consider reductions in severity of injuries because our predictive techniques and our data base do not allow us yet to do that but we are working on that and trying to do that also. It does not consider the prevention of deaths as a result of Commission activities under other than mandatory rules but the Commission is undertaking many more activities that will also significantly prevent injuries, for example, voluntary standards encouragement and participation by our staff to make sure those are meaningful:

Section 15 actions which we previously touched on in which some 25 million existing items have been involved and over 4 million have been corrected, we cannot measure injuries that did not occur.

The result of education information campaigns that we are now developing and we expect in the foreseeable future to tell you the effect

of those campaigns. We are now measuring the results in some trial areas, one in Massachusetts that I will be glad to get into if you would like.

Also, additionally it is difficult to take into account predictive technique information such as we recently got this week from our Flammable Fabrics Advisory Committee.

On that committee there are members who have spent years in burn prevention centers. Those present members as well as former members of that advisory committee who have participated in the burn prevention centers tell us that the children's sleepwear problem has been virtually eliminated by the children's sleepwear standards. I cannot tell you how many injuries that is because I have no idea how many there were in the first place.

You can use words like "tremendous effect," "virtually eliminated," but you cannot put numbers on it. I can't and I don't think anyone else can.

In another area, child-resistant packaging, the standards are beginning to show their effectiveness in collected data. Poisonings have been going down since the safety cap requirement for prescription drugs which became effective in late fiscal year 1974.

Chart 13 shows that poisonings of children under 5 years of age due to prescription drugs have decreased and are continuing down according to the first quarter comparisons for the current fiscal year. That chart shows that approximately when the prescription drug regulations became effective in fiscal year 1974 there were an estimated 10.000 poisonings per year of children under 5 in the first quarter of that fiscal year. In the first quarter of fiscal year 1976 they have almost halved.

CHART 13

NATIONAL ESTIMATES OF ACCIDENTAL INGESTION OF PRESCRIPTION DRUGS TREATED IN EMERGENCY ROOMS FOR CHILDREN UNDER 5

	Fiscal year—			
	1973	1974	1975	1976
Entire year	35,500	34,000	26,500	
1st quarter	9,500	10,000	6,500	5,500

In closing today, let me make a proposal to the subcommittee which I believe will increase the value and effectiveness of congressional oversight. I recommend that each regulatory agency be required to establish a plan containing three essential pieces of information. First, the description, size, and scope of the problem that the agency has to deal with and that has been assigned by the Congress. Second, the intended agency priorities, their rate of progress and the elapsed time the agency thinks it will take to deal with the problem or deal with the job that has been assigned by the Congress. Third, some annual benchmarks that will demonstrate whether the agency is in fact on target with their projected plan.

In other words, I propose the need for a long range plan.

I think in the oversight function of this committee at least one thing you can do is evaluate performance against a previously agreed upon plan.

This plan, I believe, should be submitted to the Congress for use in annual oversight and it should also significantly influence the budget process.

Presently the oversight process is almost entirely separated from the budget process and yet they do go hand in hand. The Commission has shown that such a plan is possible by compiling one and submitting it to the Congress and the President as the introduction to our 1977 budget estimate.

This committee has been provided with copies of that. This plan shows how the Commission could eliminate approximately 75 percent of the correctable risk, that is the standards preventable risks attributable to unsafe products if we were to mandate a cumulative total of 100 mandatory product safety rules by the end of fiscal year 1982, approximately 5 years from now.

This plan also shows and discusses that if you are into 1982 and if you have met your plan, that additional standards may be considered to be of marginal utility.

That is, reasonable people might agree that you might not be addressing unreasonable risks by the 101st standard.

In fact, our data shows that the number of injuries you would be addressing by this standard is approximately 2,400 national injuries per year on the 101st regulation.

The funding requirements necessary to allow the Commission to accomplish that goal would be an average annual appropriation of $72 million between now and the end of 1982, starting with approximately $55 million in fiscal year 1977. That is what we asked for in that plan.

When the agency met its goal, if it followed that plan and was successful, in 1982 it could be restructured into a maintenance and enforcement effort, it could be given a standard mission, or, if the Congress agrees it would be of marginal utility to continue the process the agency could be abolished because it would have completed its assigned task.

At the outset I stated there are approximately 20 million product associated injuries per year, in the United States. This number was first arrived at in a report to the Congress and the President in 1970 by the National Commission on Product Safety.

That report served as the impetus for the creation of the Consumer Product Safety Commission. This national estimate is verified by the Commission's NEISS system and it is also verified by other surveys, governmental and nongovernmental.

I also stated earlier that most experts, including the staff of this Commission and I, personally, believe that the product caused or standards preventable percentage of those 20 million injuries range from approximately 15 to 25 percent of the 20 million total.

In the same report in 1970 the National Commission on Product Safety estimated that the cost to this Nation of the total product associated injuries was $5.5 billion per year.

If you apply the same standards preventable percentages to the total injury cost it will give you an estimate of approximately $1 billion per year of costs to our citizens that are preventable by actions of this Commission.

However, it costs dollars to do that job, dollars and people. I believe that the 5-year program that is presented in the fiscal year 1977 budget

estimate of the Commission represents the best budget buy in Washington on behalf of the public interest.

If you can find a program that is as leveraged as that I haven't seen it. However, I am afraid that the historical 1-year-only look ahead that we do in our budget process and what appears to be a seeming fascination with the incremental approach to budgeting—what are you doing this year as compared to last year—tends to foreclose a comprehensive review and consideration of a long-term plan such as we have proposed.

I believe that if Congress had such a plan available from all regulatory agencies as I have recommended it would be invaluable in the difficult task of oversight.

I urge this committee to seriously review this plan. If you believe it is inadequate, if you believe it is incorrect, then surely reject it. But if you can't find fault with it then don't let it be simply ignored out of existence. It embodies, in my opinion, the very essence of the oversight function as well as imposes very stringent and responsible requirements on agency management.

It is my opinion that unless the Congress takes a look at such a plan, and I think you should in the regulatory review, unless someone does, when this Nation celebrates our tricentennial celebration this Commission will still be in existence.

In conclusion let me repeat that it is my belief that the CPSA is legislation that is basically sound. I believe it was innovatively conceived and Congress deserves all the plaudits. It affords the American public with the needed degree of protection which it did not have before.

It has been my pleasure and honor to serve as the first Chairman. I have appreciated the assistance and always courteous reception that I received from this committee as well as the other committees of Congress.

Thank you.

I will be glad to answer questions along with my colleagues.

[Mr. Simpson's prepared statement follows:]

STATEMENT OF HON. RICHARD O. SIMPSON, CHAIRMAN, CONSUMER PRODUCT SAFETY COMMISSION

[Charts are not included, as they are included in record at appropriate points during oral testimony]

Mr. Chairman: I am pleased to appear before this Subcommittee today to report on the progress and the achievements of the Consumer Product Safety Commission; to respond to your questions together with my colleagues; and to give you my personal views, as the outgoing Chairman of the Commission, on the strengths and weaknesses of the Consumer Product Safety Act. The presentation today has been generally structured along the lines suggested by the Subcommittee. The outline I will be following is shown on the first chart.

AGENCY MISSION

The enactment of the legislation to create the CPSC was the culmination of 10 years of Congressional effort to secure the consumer's right to safety in the marketplace. The specific mandate of the Commission, as spelled out in the Consumer Product Safety Act, is detailed on Chart 2. The authority of the Commission comes from five Acts, the enabling statute, the Consumer Product Safety Act, plus the four transferred acts: the Hazardous Substances Act, the Refrigerator Safety Act, the Flammable Fabrics Act, and the Poison Prevention Packaging Act.

The scope of the Commission is tremendous. There are well over 10,000 consumer products clearly subject to Commission jurisdiction; numerous others

where jurisdiction is not so clear; and more than 2.0 million manufacturing, distributing, retailing, and importing firms which fall within our area of responsibility.

The size of the safety problem is equally impressive. Conservative, accepted estimates indicate that there are approximately 20 million product-associated injuries per year with an estimated 30,000 of these resulting in death.

Before I am accused of misstating or overstating the injury estimate, let me hasten to add that not all, or even a majority, of these are believed to be product-caused injuries. Most experts place the product-caused, or "standards-preventable" portion at somewhere between 15% and 25% of the total product-associated injury figure.

I will discuss the significance of these data further in the concluding summary section.

PUBLIC PROTECTION MISSION

In the guidance provided by the Subcommittee, a request was made for a citation of "the outstanding success story in the last five years." Although the Commission is not quite three years old, it has had, in my view, several outstanding successes. Chart 3 graphically illustrates some of these accomplishments. We have successfully implemented a prototype openness policy for Federal agencies, as well as an innovative standards development process as required by Section 7 of the Consumer Product Safety Act.

We have also won several landmark decisions establishing favorable legal precedents, a necessity for a new regulatory agency. Under the Consumer Product Safety Act, an attempt to stay the collection of product ingredient data under our statutory authority to issue general or special orders was denied on November 18, 1975, by the U.S. Court of Appeals for the District of Columbia Circuit; our ability to utilize consumer deputies in attempting to alert retailers and distributors to possible Section 15 violations was similarly upheld by the U.S. Court of Appeals for the 2d Circuit and our authority under the FTC Act to issue to a manufacturer a General Order of Access for purposes of inspection under the Flammable Fabrics Act was upheld. To our knowledge, this was the first time such a broad access order was used or tested since the Flammable Fabrics Act was passed in 1953.

Were I to single out one activity, however, which, in terms of public protection, could be cited as a "success story", it would of necessity be the implementation of Section 15 of the Consumer Product Safety Act. Chart 4 highlights some of the Section 15 activity.

As you know, Section 15 places a requirement on manufacturers, distributors, retailers and importers to report to the Commission whenever they have reason to believe that products either fail to conform to an applicable consumer product safety standard or contain a defect which could create a substantial product hazard.

The Commission has efficiently handled large volumes of work related to substantial product defects from its earliest days. In fact, more than 350 reports have been acted upon to date, involving more than 24 million items, and resulting in the correction of almost 4 million of those items.

An indication of the impact and importance of the section can also be found in the fact that almost 4,000 technical inquiries have been received by the Commission requesting advice about Section 15—many raising questions of design and manufacturing practices.

We have a published policy for handling Section 15 cases, and I am pleased to report that the process generally works smoothy and effectively, with an extremely high percentage of affirmative action and cooperation on the part of the affected companies.

While Section 15 has been an extraordinarily effective feature of the act, another feature, Section 10, which involves procedures for petitioning the Commission to undertake regulatory action for the issuance of a consumer product safety rule, has presented the Commission—particularly in these days of budgetary constraints—with an anomalous situation. Proceeding from the requirements of Section 10, the first petition the Commission received requested the development of a safety standard for swimming pool slides. The first proposed safety standard under the Consumer Product Safety Act—a swimming pool slide standard—has proceeded through the required steps of evaluation of the existing data to support the petition; the Commission's decision to grant the petition; the development of the rule through the use of an offeror proceeding; the evaluation of the proposed rule; and the recently published

final standard. In any rational priority order of regulation, I would say the swimming pool slide standard, while justified and probably mandated by our enabling statue, has been the least productive agency proceeding.

I shall make a personal recommendation on a change to the petition process when discussing chart 6—Need for Revised Legislation.

PUBLIC AND CONSUMER PARTICIPATION IN THE REGULATORY PROCESS

Chart 5 leads us into a discussion area where I believe this Commission has been both innovative and forward looking.

As I have stated on other occasions, the Commission's openness policy has proven to be extremely successful, both from the point of view of agency credibility, and because it encourages public scrutiny and participation in the activities of the agency. As a companion to our openness policy, the Commission has adopted an extremely liberal interpretation of the Freedom of Information Act. An interpretation which generally requires release of all material requested, notwithstanding the available withholding exemptions in the Act. In other words, we interpret the FOI Act as just that, a *freedom* of information act, not a *protection* of information act.

One point I would raise in this regard is the apparent conflict between Section 6(b) of the Consumer Product Safety Act, which requires a thirty-day delay and notification to an affected manufacturer if materials by which he can be identified are to be released to the public, and the requirement under the Freedom of Information Act that the requesting party be notified within ten days of request of the availability of the desired materials. The Commission has been dealing with this problem by interpreting Section 6(b) as applying only to affirmative disclosures by the Commission, and the Freedom of Information Act as applying to passive release.

We are now involved in what appears to be protracted litigation on this subject in two cases, and a third case was filed against us this past Monday. I believe consideration should be given by the Congress to a resolution of this conflict by modification or clarification of Section 6(b) of the Consumer Product Safety Act. I would personally suggest that the guidelines the Commission has been following are equitable (and perhaps the only workable solution) and should be incorporated in amendments to the CPSA.

Section 7 of the Consumer Product Safety Acto, the so-called offeror section, requires the Commission to prescribe regulations governing development of consumer product safety standards which, among other provisions, require "notice and opportunity by interested persons (including representatives of consumers and consumer organizations) to participate in the development of such standards." The Commission has prescribed such regulations.

We require all successful offerors to bring consumers to the standards-development committees and solicit their opinions on costs, convenience, and other features of the rule under development. This participation has, in our view, been quite successful. To determine whether or not the procedure was viewed as meaningful by the consumers themselves, the Commission recently invited all consumer participants in the first four Section 7 proceedings to come to Washington and discuss their experiences and their views of the process. The response indicated that the consumers felt they did have a meaningful and significant impact.

Consumer voices are also heard in the Commission advisory committees. We have sought candidates for appointment to these committees through press releases with wide national circulation as well as through *Federal Register* notices. The response has been excellent. The Product Safety Advisory Council, as specified by the Consumer Product Safety Act, is composed of one-third consumers. By Commission policy, the advisory committees required by the Flammable Fabrics Act and the Poison Prevention Packaging Act, are composed of one-half consumer representatives.

We have also established an innovative policy which permits use of consumer volunteers to assist in specific surveillance operations. We call these Consumer Deputy Programs. (The word, "Deputy" in this case means volunteer, not vigilante as some have alleged). Local volunteers are solicited through area offices, are trained by Commission staff, and are utilized to survey retail shelves; to provide information to retailers on Commission regulations; and to collect information on products in the marketplace. Six programs, utilizing 3,000 volunteers visiting approximately 8,200 establishments have been successfully completed in the last two years.

We have recently provided a funding mechanism to assist in the expansion of, and to secure feedback on, specific issues from the Consumer Sounding Boards, a nationwide network of representative consumer panels convened to provide opinion input on specific questions. For instance, we are presently seeking "soundings" on the projected costs associated with the power mower standard currently in development.

Additionally, our successful Consumer hotline, consumer outreach programs from our field offices, and the right of the individual consumer to petition the Commission all help to assure more than token consumer involvement in the work of this agency.

LEGISLATIVE RECOMMENDATIONS

I would like to turn now to Chart 6, the need for revised legislation, and discuss some of the other areas in which I believe changes would be beneficial. These comments are based on my own personal observation and experience in the past three years as Chairman of this Agency. Basically, I believe the CPSA to be quite sound. I do, however, believe that some changes should be seriously considered.

Many people believe that the so-called independent agencies constitute a "headless" fourth branch of government; a branch that is without adequate checks and balances. I believe such concern is well founded, and I would urge that this Committee, as part of the overall process of regulatory reform, reconsider whether a regulatory function is more properly assigned to an independent commission, like CPSC, or to an executive branch agency, like FDA.

When I, as Chairman, after almost three years, cannot tell you whether CPSC is part of the Legislative or Executive branch, then there is, at a minimum, some confusion, and I am not alone. My personal questioning of members of both the House and the Senate on this same question shows them about equally split. Such a situation makes for obvious accountability problems in the future and should be clearly resolved by the Congress.

I have previously touched on the second item on Chart 6, the CPSA Section 6 versus the FOI Act controversy, and I will not dwell any further on this subject. I would be glad to elaborate further in the questioning process should you desire.

Section 7 of the Consumer Product Safety Act—the offeror provision—is unique in the way it mandates meaningful public participation in the standards writing process. The Commission has previously indicated to the Congress that more flexibility is needed in the various time schedules contemplated by the CPSA for various stages of this process.

Our experiences with some of the early offeror standards developments are shown graphically in Chart 7. Looking at the blue section, you will notice that in all cases the proposed time for the offeror to develop the standard substantially exceeded the 120-day statutory time (except in the bookmatch case and in that instance the job ultimately was not completed in that period). For example, in the TV safety standard development currently underway, we allowed 150 days plus a recent 250-day extension for the offeror development period.

Another characteristic feature of the present process is the seemingly unusual amount of time for the commission to complete the process after the offeror has submitted his work effort. To highlight this, I would draw your attention to the gray and tan areas on the chart. The grey represents the time required for the Commission to evaluate the work submitted by the efferor and the tan reflects the time required for the Commission to rework the offeror's submission so that it can be published as a proposed standard.

Section 7, as mandated by the CPSA contemplates three separate and distinct phases to the standards development process:

Step 1.—The Commission finding of risk, together with a notice in the *Federal Register* detailing how the product is involved with the user.

Step 2.—The selected offeror forms his committees and attempts to write a standard which reasonably addresess the identified risks.

Step 3.—The Commission evaluates the offeror's work effort and makes changes as required.

I believe we can always expect delay and confusion to be a part or by-product of the offeror process as presently envisioned in the CPSA because, in my opinion, the real-world standards writing process is not partitioned into three distinct and separate phases. As a matter of fact, in standards writing, there is a continuous process involving frequent back and forth excursions between injury data review, examination of possible technical solutions, and review of those solutions, when writing a standard. Each phase may be touched on up to

ten times, or more, in a completely iterative process, before arriving at a standard.

In order to retain the very positive features of meaningful public participation, while at the same time reducing the time, cost and confusion to arrive at a standard, I suggest that Section 7 needs to be revised.

I suggest a revision that would place the Commission in the role of the offeror, or standards manager, in all Section 7 standards efforts. Such a change would make meaningful and possible the necessary excursions between what is now a process involving three distinct phases while retaining the plus feature of meaningful private party involvement.

At this point, I turn my attention to Section 10—in many ways, the real beginning of the regulatory process for this Agency. I strongly believe in the right of citizen petition. I further believe that the exercise of that right by interested parties is a valuable communication link for the Commission. I suggest, however, that some minor changes in the language of the Act would improve this very meaningful public service tool, and aid the Agency in meeting its mandate, as well.

Chart 8 graphically shows the workloads which have been generated by the petition process. As you will note, 104 of 226 petitions (nearly half) have been denied. Although the resources required to deal with those denied petitions is significant, we have no tangible output or regulation to show for the invested effort. Under the Act as it now stands, the Commission is subject to court suit if the petitioner does not agree with our determination, and the court can instruct the Commission to commence a Section 7 rule development proceeding.

Such a provision, by its nature, makes it incumbent upon the Commission to fully study and assess each petition, despite the fact that preliminary decisions could undoubtedly be made relating to the substantive nature and/or impact to the public at large, which would place the petition in a lower priority status or permit denial more rapidly, were such actions possible under the Act.

Chart 9 gives some insight. The ten petitions granted so far under CPSA could address a total of approximately 155,000 annual preventable injuries. If, instead, CPSC had been in a position to select and work on the ten product categories with the highest rate of injury, approximately 1,230,000 annual injuries might have been addressed.

It is certainly of questionable public interest when limited resources and time are overwhelmingly spent on lower-priority, petition-generated effort, as compared to an effort specifically directed toward more comprehensive problems.

To implement the petition process more effectively and efficiently, there should at a minimum be more flexibility in the 120-day Commission response period. A longer period should be allowed on a finding of good cause which would be based on the complexity of the issues involved and the state of existing knowledge on those issues. The Commission, in my opinion, should also clearly be able to deny a petition even where unreasonable risk exists if the risk is not found to be sufficiently high in a rational priority ranking to require immediate action. This denial should be without prejudice for future refiling.

Returning to Chart 6, we see that the next item is Expansion of Enforcement Capability. The question of enforcement powers is one which has been recently examined at some length by the Congress as a whole. The Commission has recommended—and in view of current and predicted budget and personnel constraints, renews its plea—that, at a minimum, two additional authorities should be available to the agency to provide maximum leverage of its limited enforcement resources.

First, the requirement in Section 27 that the Commission work through the Attorney General in filing both civil and criminal cases hampers, and, in point of fact, virtually negates, our efforts to expeditiously and efficiently enforce the laws which we administer. We have suggested amendments to the Consumer Product Safety Act to authorize the Commission to proceed, without the concurrence of the Attorney General, in any court action in the name of the Commission for the purpose of enforcing the laws subject to jurisdiction, including injunctions and seizures.

Second, Section 22 should be amended to authorize the seizure of products distributed in commerce which have been determined to present a substantial product hazard under Section 15 of the CPSA.

Generally speaking, however, the regulatory powers of this Commission are adequate—indeed, many believe, more than adequate.

I have previously mentioned Section 27(k), and would again urge you to take a look at the historical impact that section has had on the early growth—

or nongrowth, as has proven to be the case—of this Agency. The Consumer Product Safety Commission has never, in my opinion, had the advantage of an adequate base budget. It has never received funding from the Congress which would permit it to address on its own initiative those candidates for regulation which score high on our priority list. We have found ourselves continuously in a reactive stance, with priorities imposed by the language of the legislation and the implementation of the requirements of the statute. That is, the provisions of Section 10 with its mandatory forcing actions and time frames; the follow-on provisions of Section 7; the need to respond to Section 15 reportings and the inabilty to take our own cases into court in order to leverage our enforcement capabilities. At what point this budget provision can be considered counterproductive is not easily detectable and at what point the damage can be reversed is not easily predictable. The section should be examined in detail, in retrospect, and if the budget system cannot support this unique provision, I would urge that it be repealed.

The next area I would like to discuss concerns the transferred acts. In many instances, in my view, it would be desirable, and in the public interest, for the Commission to proceed under the broader and more viable provisions of the CPSA, in dealing with product hazards that are or would be subject to regulation under the transferred acts. Section 30(d) of the CPSA currently provides that a risk of injury which is associated with a product and which could be eliminated or reduced to a sufficient extent by action taken under the transferred acts may be regulated by the Commission only in accordance with the provisions of those acts.

The key words here are "eliminated or reduced to a sufficient extent," which the legislative history indicates is limited to an evaluation of all aspects of the risk involved and the remedial powers available. Thus, the Commission cannot decide to proceed under the CPSA unless the risk involved either could not be regulated at all under a transferred act or could not be reduced or eliminated with the remedies available. This does not permit the Commission to consider factors such as the time involved in obtaining a regulation, the cost of the regulation to both consumers and industry as well as other factors which affect the public interest.

The result has been both unnecessary confusion and unnecessary litigation. In my personal opinion I see no persuasive public interest argument in favor of continuing the existence of the transferred acts. The Congress should "bite the bullet" and abolish these acts, bringing the existing regulations and product coverage under the CPSA.

Speaking of "biting the bullet", that introduces the next legislative change needed. This Commission has been involved in protracted, confusing and unnecessary litigation involving two products which almost everyone agrees were not intended by the Congress to be subject to CPSC jurisdiction—cigarettes and bullets. The surrounding controversy and public confusion has been extremely harmful to the Commission. I urge the Congress to clarify this jurisdictional question at the earliest possible date.

The last item on Chart 6 is titled Collegial Body—Decisions and Management. As this Committee is aware, regulatory bodies are either headed by a Committee, as is the case of CPSC, or by a single Administrator, as is the case with FDA and NHTSA. Both organizational forms have their obvious positive and negative features.

I have had previous experience in corporate life with the single Administrator (or President) form of organization, but the last three years has been my first experience with the Collegial body or committee concept.

With all due respect to my colleagues, I am persuaded by the person who once observed, "If you must manage and make decisions by committee, the committee should have an odd number of members, and three is too many."

I would urge this Committee, and the Congress as a whole, to look seriously at the pluses and minuses of both organizational forms when looking at overall regulatory reform initiatives.

The Subcommittee expressed a particular interest in our compliance and enforcement operations. Today, I will provide you with a brief review of our current compliance goals, as graphically portrayed in Chart 10.

Obviously, an agency consisting of 890 people cannot begin to frequently inspect a marketplace where more than 10,000 consumer products, over which this Commission has jurisdiction, are sold in more than two million manufacturer, distributor, and retail establishments. Ideally, each field office should

visit each business in its area which has such products at least once a year. Given the size of the Commission, and the number of such establishments, we estimate that our present staffing level would only allow an inspector to visit each establishment once about every century.

The question then is how does the Commission enforce its rules and standards, and how does it safeguard the marketplace, and therefore the consumer, from unreasonable risks from consumer products. The numbers of products banned or seized, injunctions issued, civil actions initiated, or criminal prosecutions brought are, in the final analysis, not true measures of effectiveness. The definitive measure of effectiveness is the number of injuries that are reduced by various Commission actions.

We have made a great deal in our speeches and other public contacts of "motivational compliance." Very simply stated, motivational compliance embodies the concept that the Commission will not hesitate to use all of the administrative and legal options at our command to achieve conformance with the applicable laws, rules, and regulations. Enforcement actions must be strategically directed toward retailers, importers, distributors, private labelers, and manufacturers in such a way as to motivate compliance through consistent demonstration of the consequences of noncompliance.

This strategy becomes increasingly vital given our limited funding and personnel. In fact, as a result of our inability to receive the level of funding that I believe essential to accomplish our mission, it has recently been necessary for me to reduce our near-term compliance and enforcement effort in 1976 and 1977. I have ordered a freeze on recruitment or hiring by the field, with a corresponding transfer of positions to headquarters to support the required standard development program and related activities.

We have been successful in reducing the average time frame for case development from over one year to 3–6 months. We believe an important element of our future compliance effort is our shift, now in progress, from a periodic random surveillance program to a systematic surveillance program targeting specific product lines. Thirteen targeted surveillance programs constitute the bulk of our last 18 months compliance work. We anticipate that shortly approximately 50 percent of our field inspections activities will be preprogrammed along specific product lines.

The bulk of our surveillance activity is accomplished by Commission field staff, but valuable outside resources have been utilized through state contracts and the previously mentioned Consumer Deputy programs. As a part of its compliance and enforcement program, the Commission has also developed short-term response procedures for reacting to substantial and imminent hazards.

On the more positive side, I believe it would add another dimension to our compliance effort if affected companies, who are complying with existing standards, were not foreclosed from citing that demonstrated compliance in the course of product liability actions. At present, this is specifically foreclosed by the language of Section 25(a) of the Consumer Product Safety Act. I recommend that this language be repealed.

I consider it very important that we be able to evaluate compliance under the Commission's statutes. Calling your attention to Chart 11, I would point out that the Commission has been actively working for the last 18 months to achieve the ability to compile and use information such as you see displayed in this chart. I endorse the concept of annual compliance reports, not only for use in agency oversight by the Congress, but for use by agency management as a review of compliance activities.

With limited Commission inspectional resources, I would again remind you of the importance we place on the ability to have selected civil and criminal cases filed by the Agency.

MEASURES OF EFFECTIVENESS

In evaluation of its programs, the primary measure of effectiveness utilized by the Commission is the degree to which our programs reduce the frequency and/or severity of injuries associated with consumer products. It is difficult to estimate this with a high degree of precision because our data bases do not contain a great deal of historical data. These data bases have been implemented fully only recently and did not exist prior to the establishment of the Commission.

A more important difficulty in measuring effectiveness is that most Commission actions do not have large immediate effects in terms of numbers of injuries prevented. For instance, a great deal of work has been done on standards and other programs which have not yet been finalized. As an example, manufac-

turers will have one year in which to comply after promulgation of the architectural glazing standard. Even when a standard becomes effective, the full benefits may take many years to accrue because of long product lives which keep substantial numbers of noncomplying products in the hands of consumers for many years after the effective date of a standard.

Because of these factors, the best measure of our overall effectiveness must be obtained from predictive techniques. Chart 12 presents our estimates of the number of annual injuries prevented (or that will be prevented in future years) as a result of the rules that will be in effect by the end of FY 1976. We estimate that 50,000 injuries will be prevented during FY 1976 and that this will nearly double in FY 1977. This increase will continue into the future. The future cumulative effect of the standards that will have been promulgated by the end of FY 1976 will be 675,000 injuries per year.

This measure of effectiveness does not consider reductions in severity of injuries, or the prevention of deaths, as a result of Commission activities other than mandatory rules. The Commission is undertaking many other activities that will also significantly prevent injuries; for example, voluntary standards encouragement, Section 15 actions, and information and education programs.

In one area, child-resistant packaging, our standards are beginning to show their effectiveness in collected data. The safety cap requirement for prescription drugs became effective in late fisal year 1974. Chart 13 shows that poisonings to children under five years of age due to prescription drugs have decreased and are continuing down according to the first quarter comparisons for the current fiscal year.

SUMMARY

In closing today, I would like to make a proposal to the Subcommittee which I believe will increase the value and effectiveness of Congressional oversight. I recommend that each regulatory agency be required to establish a plan containing three essential pieces of information. First, a description of the size and scope of the problem that the agency has to deal with. Second, the intended agency priorities, rate of progress and elapsed time that the agency foresees it will take to remedy the problem. Third, the annual bench marks that will demonstrate whether the agency is on target. In other words, I propose the need for a long-range plan to get the job done.

This plan should be submitted to the Congress for use in annual oversight hearings. It should also influence significantly the budget process.

The Commission has shown that such a plan is possible by compiling one and submitting it as the introduction to its 1977 Budget Estimate. This plan shows how the Commission could eliminate approximately 75% of the correctable risk attributable to unsafe consumer products by mandating a cumulative total of 100 mandatory product safety rules by the end of FY 1982. This plan shows that additional standards may be of marginal utility, i.e., they may not be addressing unreasonable risks. The funding requirements necessary to allow the Commission to accomplish that goal would be an average annual appropriation of $72 million between now and the end of 1982, starting with $55 million in FY 1977. When the agency completed its goal, it could be restructured into a maintenance and enforcement function; it could be given a new mission; or it could be abolished.

At the outset, I stated that there are approximately 20 million product-associated injuries per year in the United States. This number was first arrived at in a report to the Congress and the President in 1970 by the National Commission on Product Safety. This national estimate is verified by the Commission's NEISS system as well as other non-governmental surveys.

I also stated that most experts, including this Commission, estimate that the product-caused or "standards-preventable" portion of those injuries ranges from 15% to 25% of the 20 million total.

Also, in 1970, the National Commission on Product Safety estimated that the cost to the nation of the total product-associated injuries was $5.5 billion per year.

Applying the same "standards preventable" percentages to the total injury costs gives an estimate of approximately $1 billion per year of costs to our citizens that are preventable by the actions of this Commission. However, it costs dollars to do the job. I believe the five-year program presented in the 1977 Budget Estimate of the Commission presents the best "budget-buy" in Washington on behalf of the public. However, I am afraid that the historical one-year only budget review and the seeming fascination with the incremental approach to budgeting tends to foreclose a comprehensive review and considera-

tion of a plan such as we have proposed. I believe that if Congress had such a plan available from all regulatory agencies, as I have recommended, it would be invaluable in the difficult task of oversight. I urge this Committee to seriously review this plan and not let it be ignored out of existence. It embodies, in my opinion, the very essence of the oversight function as well as imposes stringent and responsible requirements on agency management.

In conclusion, I would like to repeat that it is my belief that the Consumer Product Safety Act is legislation that is basically sound. I believe it was innovatively conceived and affords the American public with a needed degree of protection which they did not have before.

It has been my pleasure and honor to serve as the first Chairman of the Commission, and I have appreciated the assistance and courteous reception that I have received from this Committee during my tenure.

Thank you, Mr. Chairman. I would be pleased to answer any questions you and the Subcommittee may have.

Mr. Moss. Thank you, Mr. Chairman.

I want to assure you that the entirety of your statement will be given very careful consideration.

We are seeking the kind of information we seek here this morning for the purpose of recommending to the legislative subcommittees rewrites of legislation in order to improve the whole effectiveness of regulatory assignments and to eliminate the nonproductive, nonessential features of regulation.

I wonder if any other member of the Commission has at this time any comment or statement that he or she would like to make to the subcommittee before we commence questions.

STATEMENT OF CONSTANCE B. NEWMAN, COMMISSIONER

Ms. Newman. Mr. Chairman, I do not have a formal statement but I certainly hope that somewhere in the process I might have the opportunity to discuss my views on the collegial body versus the single administrator, the offeror process and the petitions process. Those are areas that I have very strong views on and which may differ from those of the Chairman.

Mr. Moss. You may do it now, or you may at your option reserve and file with the subcommittee a statement which we will review and, should it be necessary, arrange a schedule that will permit you to appear.

Ms. Newman. I do not want to infringe on your questioning. I will see how that goes. If you have time, I will speak today, otherwise I will submit a statement.

Mr. Moss. Without objection we will hold the record for the receipt of your statement.

[Commissioner Newman subsequently submitted the following statement for the record:]

Statement of Constance B. Newman, Commissioner, Consumer Product Safety Commission

Mr. Chairman: I would like to submit for the record my views on three issues that were raised at the January 30, 1976 oversight hearing of the Consumer Product Safety Commission before this subcommittee. I have chosen to limit my remarks to a consideration of (1) the offeror system, (2) the right of public petition, and (3) the collegial body since, because of their implications about the nature of good government and the regulatory process, I believe that these issues are critical to the future of the Consumer Product Safety Commission. I believe that these issues go to the heart of the question of a regulatory agency's accountability to the public.

1. THE OFFEROR PROCESS

I continue to believe in the validity of this approach to standards development. Because the offeror process ensures that the public will have the opportunity to participate in a substantive way in an area that will affect its health, safety, and pocketbook, the public need not depend upon the whim of government employees for when, how and if participation in standards development will occur. Rather, the offeror process provides the public with the *right* to participate. If, however, as has been suggested, the offeror section of the CPSA were to be amended to allow the Commission discretion with regard to public participation, an element of *noblesse oblige* would be introduced. It is, I believe, in everyone's best interest *not* to allow this to happen. In this period of general estrangement of the public from institutions of government, we should do all that we can not only to assure the responsiveness of government to the public but also to recapture the feeling of responsibility that each citizen once had for the effective functioning of government. The offeror process, as it now stands, helps to assure both of these points.

On a less abstract level, if the offeror process were to be amended to provide for the Commission to manage the standards development process, a cornerstone of the offeror process would be eliminated. This cornerstone is the concept of the private sector having the first cut at drafting the standard. This point is related to the one I just made: it is extremely difficult to re-shape any regulation after the first draft is done, because it is in the initial drafting that the fundamental trade-offs are made. Thus, to replace the private sector offeror with the government is to some extent to dilute the meaningfulness of the free exchange among competing interests contemplated by the offeror process. It is also, most certainly, to ensure more rather than less regulation.

Although the statutory time-frame mandated for the development of standards under the offeror process may be unrealistic for many types of standards, I do believe that the existence of this time pressure has resulted in a faster development process than would have been the case if the agency had been left to its own devices. To those who say that the offeror process provides the opportunity for too many delays and unnecessarily lengthens the time that standards development takes, I would point to the bicycle regulation. This regulation was started under HSA at FDA before the Commission came into existence: the standard has yet to become effective. I make this comment not to criticize the bicycle regulation but rather to answer those who argue that it is the offeror process that is responsible for the delays in standards development. Moreover, while it is true that they might not be comparable in terms of complexity, it is also true that the swimming pool slide standard was developed more quickly than any product safety standard has been developed under the transferred acts.

It is true, as the Chairman remarked in his opening statement, that the standards development process is "not partitioned into three distinct and separate phases." However, it has been my observation that very few processes lend themselves easily to such partitioning. Analysis of possible technical solutions in light of injury data does not seem to me to be in conflict with the offeror system. Nonetheless, the CPSA quite rightly requires the Commission to make a preliminary finding that an unreasonable risk of injury exists prior to deciding that a standard is necessary. I believe that the offeror process provides appropriate benchmarks against which to assess the validity of this preliminary determination. I believe that such benchmarks are critical to a rational approach to standards development; thus, I do not believe that the existence of these benchmarks is an adequate reason to discard the offeror system. Rather the contrary. Thus, I am disturbed by the implication in the Chairman's testimony that in eliminating the offeror system, responsibility for the final evaluation of the preliminary determination of the existence of unreasonable risks of injury and the appropriateness of the proposed standard to address these risks should become less easy to pinpoint.

2. THE RIGHT TO PETITION

I believe that Section 10 of the CPSA is fundamental to the credibility of CPSC. The public should be able to petition us and to have recourse should we fail to act; I believe that CPSC should welcome the existence of this recourse as a check on its own actions. To argue, however, that the right of petition disrupts orderly priority setting is, in my view, to argue speciously. It is specious on two counts: (1) the public's views should be factored into priority setting, and (2) mechanisms short of abolishing the possibility of recourse could easily be set in place

to expedite and to guide how petitions are handled (e.g., procedures both governing risk classifications and depth of analysis, and defining more precisely than has been done just how petitions fit into CPSC's priority system, etc.) that would ensure that the dog is not wagged by the tail. This becomes, I believe, largely a question of efficient management.

3. COLLEGIAL BODY

I subscribe to the theory behind the collegial body: a multi-member agency, with the members from differing backgrounds, is more capable of regulating in the public interest than is a single administrator. The regulatory decisions reached by such a body are more likely to be a reasoned balancing of diverse interests than are those for which a single person is responsible. Effective policy formulation and adequate accountability of CPSC are possible under the CPSA. Furthermore, the fact that strong administrative powers are vested in the Chairman who serves as Chairman for the duration of his or her term of office provides the mechanism for effectively managing the staff charged with implementing the Commission policy decisions. I do not make these comments lightly; I have pondered at length the question of the multi-member agency's effectiveness and have reached the conclusion that the CPSA has provided a structure that would facilitate rather than hinder efficient regulation in the public interest. I am taking, therefore, the liberty of appending the detailed reasoning behind this conclusion for insertion into the record of this hearing; my reasoning is reflected in an article appearing in the May 1975 George Washington Law Review, "The Consumer Product Safety Commission: Does It Can the Ash Report?"

As I stated at the beginning of these remarks, I view the offeror process, the right to petition and the multimember body responsible for regulatory decisions as central to the continued credibility of the Commission as a responsive, accountable agency of government. To tamper with these provisions of the law, I believe, would be to lessen the Commission's accountability to the public and to call this credibility into question.

[Commissioner Newman's law review article is reprinted as Appendix D, p. 275.]

Mr. Moss. Mr. Pittle.

Mr. PITTLE. I would like to take the opportunity now if I could have it.

Mr. Moss. You may proceed.

STATEMENT OF R. DAVID PITTLE, COMMISSIONER

Mr. PITTLE. I did prepare a short statement which I have subsequently cut down to make it even shorter so that we can get on with the questions.

I would like to reserve the opportunity to submit something further for the record later.

Mr. Moss. Would you like to have the statement submitted for the record and then proceed to summarize your views or would you like to have the opportunity to revise and extend your statement?

Mr. PITTLE. That will be fine. Thank you.

Mr. Moss. We will hold the record to permit the revision and extension. (See p. 35.)

Mr. PITTLE. As the members of the committee are aware, section 7 sets forth certain procedures for the development of safety standards which are collectively referred to as the "offeror process."

As we have gained experience with that process I have come to several tentative conclusions which I would like to share with you this morning.

First, I believe that the high cost of standards development is likely to result in the loss of nonindustry groups as offerors. This may seem unduly pessimistic on my part given that two of the first five instances where offerors have developed proposed standards under the CPSA,

book matches and lawnmowers, involved consumer organizations having all or a substantial part of the responsibility for drafting the standards. However, I believe these two instances reinforce rather than negate my conclusion.

In the case of the lawnmowers, Consumers Union, after having received over $150,000 from the Commission to develop a draft standard, nevertheless still found that its costs far exceeded those funds and has now sought additional reimbursement in the amount of $84,000.

In the case of book matches, ASTM, American Society for Testing Materials, absorbed all the cost for developing the draft standards including those of the consumer caucus which played a primary role in the standards development effort.

However, the Commission still had to pay the offeror $24,600 to cover the cost of expanding the standard's technical rationale after the proposed standard was submitted. More significantly, the Director of ASTM has stated that, in view of the heavy cost of the process, ASTM will insist on reimbursement for all expenses should it become involved in the offeror process again.

One must conclude from these and other examples that the standards development process is extremely expensive. Also, if one accepts the public statements on this point, one must conclude that few Members of Congress or of this Commission anticipate providing large sums of money to reimburse most offerors. Indeed, the Commission has adopted the philosophy that contributions shall be the exception rather than the rule. I am convinced that it is highly unlikely that we shall see nonindustry offerors in the future. I think the loss of such offerors would be most unfortunate and contrary to the spirit of section 7. Unless we are ready to turn over the development of standards to those members of industry who are able and willing to pay these costs, and they are not very many, I believe that this agency needs and must have the funds necessary to support nonindustry offerors.

Second, I am skeptical about the ability of the offeror process to produce quality standards on an expeditious basis. I agree with the chairman's concern about the time-frame of section 7 and I will delete my comments about that aspect and submit those for the record.

Third, and most important, I am concerned about the quality of standards produced under the offeror process. While it may be somewhat premature to judge the whole process on the basis of the few standards I have seen so far, I am not hopeful about the future. It is my judgment that the draft standards submitted by the architectural glass and swimming pool slides offerors were nothing more than warmed-over versions of voluntary standards previously determined to be inadequate by this Commission.

I believe this is in part due to the short time available to develop a standard. There just is not enough time to create new approaches and hence there is a natural tendency to try to live with existing solutions.

The book match standard on the other hand, while apparently innovative, suffered from the extreme haste of the offeror's effort to meet the statutory deadline.

Hence, we had to do additional work. In each of these cases the Commission found it necessary to request CPSC staff to make substantial changes in the draft standards.

I have detailed my conclusions on the offeror process because I believe the time is fast approaching when the Congress should focus its attention on the process to see if it is working.

When you, the Congress, judge this Commission you ask us if we produced as many standards as our resources permit.

You ask us if these standards are written clearly and expeditiously. You ask us if they will impose undue cost on consumers and producers and, above all, will the standards reduce unreasonable risks of injury?

In judging our performance you must weigh in the balance the tools you have given us to create those standards. Clearly the offeror process is the major tool. You must determine whether it is adequate for us to do the job that you expect.

Thank you.

[Commissioner Pittle subsequently submitted the following statement for the record:]

STATEMENT OF R. DAVID PITTLE, PH. D., COMMISSIONER, CONSUMER PRODUCT SAFETY COMMISSION

OFFEROR PROCESS

The offeror process has been praised as a way to insure "public participation" in standards development. Government, it is suggested, does not have a monopoly on wisdom in standards development. The "private sector" should be relied upon wherever possible.

It is difficult to disagree with statements such as these in the abstract. However, I do not believe that they can be properly evaluated outside of the CPSC experience with offerors. From this perspective, the words of praise take on a new meaning. Because standards development is so expensive and because a majority of Commissioners appears unwilling to adequately fund offerors, I believe it is highly unlikely that we shall see nonindustry offerors in the future.

This, to me, is an absolutely critical issue. Those who insist that standards development is more appropriately handled by the "private sector" than by government but who simultaneously argue that "private sector" offerors should bear the financial burden of standards development, in my opinion, confirm this point. I believe that substantial CPSC funding should be available, where necessary, for groups without a significant, private, economic interest in the outcome of a standard. Without such funding, only industry groups can afford to become offerors.

If I am correct in my assessment—and I hope I am not—the offeror process can hardly be characterized as incorporating "citizen" or "public" views. Rather, it should simply be considered a way for industry to provide first drafts of standards for the Commission to evaluate and modify. This may be an entirely legitimate approach to standards development but Congress and the public should not be misled into believing that the offeror process is a new form of democracy at work.

Another issue of equal concern to me is the payment to consumers who participate on a standards-development committee organized by an offeror. While the opportunity to influence the outcome of a standards-development effort is obviously of a different order of magnitude for a "participant" than for an offeror, I believe a participant can provide significant input if he or she is qualified and properly prepared. However, one must recognize the necessity for properly qualified and prepared participants. A consumer, irrespective of his or her sincerity, must have the capability to understand and counter, where necessary, the claims made by industry representatives if a proper balance of input is to be achieved. Even with such capability, a large disparity in resources is often apparent. According to Dr. Robert Goldstone, a member of the lawnmower standards development group:

"These industry men are full-time representatives and high powered from the top of their organizations, on salary, devoting five days a week to the time spent working on the standard. The rest of us are trying to raise children, work, carry

on the other activities that we have been carrying on prior to becoming involved with the drawing of the standard, and attempt to compete with these people."[1]

This disparity might not be as great if consumer participants were provided funds to hire consultants or to do necessary research and testing. Without such funds, they must often rely on the industry for basic technical information. As Dr. Goldstone further stated:

"If we want to find out how fast an engine stops, Mr. So and So from the engine company gives us the number, and we have no way of verifying that. We accept it on faith, or we have to go to extremes to find otherwise.

"The means were not available, no matter how technically oriented the bulk of our consumers were, to get the information that we needed as technicians."[2]

Under such circumstances, it is difficult for me to conclude that consumer input into the standards-development process has been without problems. Until adequate funding is provided for technically qualified consumers to participate in a meaningful way, I cannot agree with the proposition that CPSC standards reflect sufficient consumer input.

In addition to my concerns about the loss of nonindustry offerors and the inadequate funding of consumer participants, I believe that the offeror process as implemented by the Commission has not been as effective as it might be. I have shared my thoughts with the other Commissioners in a memorandum. Rather than repeat these concerns, I have included this memorandum for the record.

Beyond my suggestions for improving the offeror process within the present framework of section 7 of the CPSA, I believe additional modifications from Congress may well be necessary. Such modifications, if carefully constructed, would, I believe, enhance rather than diminish the amount of public participation in standards development.

Although my thoughts are somewhat tentative at present, I believe that instead of relying on an industry group as the offeror—which I think will be the typical case in future CPSC proceedings—the Commission should have the option to be the offeror itself. That is, the Commission should be required to include both industry and consumer participants at key stages in the development of a standard and should be required to meet statutory deadlines in the same manner as any offeror. The advantage of this approach is that it retains public participation but adds an element of accountability to the CPSC's activities. With greater CPSC control over the outcome of a standards-development effort, there can be little excuse for poor quality standards or for excessive delay in the drafting of standards.

TRANSFERRED ACTS

Both the Chairman and Commissioner Kushner argue strongly for repeal of the Flammable Fabrics Act (FFA), the Federal Hazardous Substances Act (FHSA), and the Poison Prevention Packaging Act (PPPA). These Acts were "transferred" to the Commission by section 30(d) of the CPSA.

According to my colleagues, unnecessary confusion and needless litigation have resulted from the language in section 30(d) which states:

"A risk of injury which is associaated with consumer products and which could be eliminated or reduced to a sufficient extent by action taken under the Federal Hazardous Substances Act, the Poison Prevention Packaging Act of 1970, or the Flammable Fabrics Act may be regulated by the Commission only in accordance with the provisions of those Acts."

Quite frankly, I am at a loss to understand my colleagues' concern. To my knowledge, there has *never* been an instance in which any confusion resulted or litigation arose over the fact that action was taken by the Commission under the FFA or the PPPA rather than the CPSA.

The only Act for which there has been any controversy is the FHSA. In fact, there has been little, if any, controversy over most portions of the FHSA. The major problem centers on the Child Protection and Toy Safety Act amendment to the FHSA. I believe the problem stems not so much from confusion about the meaning of the Act as it does from a fundamental, good-faith policy disagreement among the Commissioners as to the *wisdom* of using one Act rather than another.

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[1] Meeting on Consumer Participation in Section 7 Proceedings, Washington, D.C., August 6, 1975, Transcript, p. 90.

[2] *Id.* at 90–91.

To the extent that any confusion does exist, I believe it can be greatly reduced by the adoption of a rule of interpretation for the Act. I have attempted—with a notable lack of success—to convince my colleagues to adopt such a rule. (A copy of a memorandum of mine is included for the record.)

However, as stated, I strongly believe that the fundamental issue is whether or not the CPSA is preferable to the FHSA Child Protection and Toy Safety Act. My colleagues believe it is. I strongly disagree.

The greatest disagreement has arisen in situations where products arguably may be classified as "toys or other articles intended for use by children" under section 2(f)(1)(D) of the FHSA but where the products are used to varying degrees by adults. In such cases my colleagues have preferred to utilize the procedures set forth in section 15 of the CPSA whereas I have preferred—both for legal and policy reasons—to utilize the procedures of the FHSA.

My legal reasons are simple. Section 30(d) is not, at present, discretionary.[3] If the Commission could eliminate or reduce to a sufficient extent the risks of injury associated with a toy or other article intended for use by children, it *must* do so even though it might prefer to use a different Act. The fact that adults may use an article intended for children does not remove FHSA jurisdiction.[4]

My policy reasons require a brief comparison of the banning procedures under the FHSA and the adjudicative proceedings under section 15 of the CPSA.[5]

Under section 3(e) of the FHSA, 15 U.S.C. § 1262(e), the Commission may use the informal rulemaking procedures of the Administrative Procedure Act (APA), 5 U.S.C. § 553, to ban a dangerous product intended for use by children. This procedure requires only publication of a proposed ban in the *Federal Register* and the opportunity for public comment before a ban may be made final. Under section 15 of the FHSA, 15 U.S.C. § 1274, manufacturers, distributors and retailers must repurchase all banned products sold by them irrespective of whether the products were banned at the time of sale. In addition, the Commission's regulations implementing this provision require, *inter alia*, retailers who have sold banned products to post conspicuous notices in their stores of the articles that have been banned and the procedures for their repurchase. 16 C.F.R. § 1500.202; 39 Fed. Reg. 4469 (1974). FHSA procedures can be invoked and implemented very swiftly, often with little cost. In contrast, analogous provisions in section 15 of the CPSA require a full adjudicative hearing, the end result of which, if the Commission is successful, will be an order granting the respondent(s) the election of repairing, repurchasing, or replacing substantially hazardous products. It is unlikely that such cases—other than those of the most minimal complexity—can be completed in less than one year.

Further, unlike the FHSA which prohibits anyone from manufacturing or selling banned products, the CPSA adjudicative procedures apply *only* to those companies against whom proceedings are brought. Persons not subject to a CPSA action could continue to sell dangerous products.

Finally, the FHSA provides in section 3(e)(2) for the emergency banning by notice in the *Federal Register* of a dangerous toy where the Commission finds that it presents an imminent hazard to the public health. The CPSA, by contrast, requires the Commission to seek out individual defendants and take them to court to obtain injunctive relief in the event that it believes that it has discovered an imminent hazard.

In my opinion, the streamlined procedures of the FHSA Child Protection and Toy Safety Act reflect a congressional feeling that one group in society—children—is particularly susceptible to harm and should be swiftly and vigorously protected. I would not lightly abandon this special law.

PETITIONS UNDER SECTION 10 OF THE CPSA

In commenting on the fact that the swimming pool slide standard was the first standard issued under the CPSA, the Chairman stated that because slides are a low priority, unreasonable risk, the standard "has been the least productive

[3] Should H.R. 6844 and S. 644 (The Consumer Product Safety Commission Improvement Act) be signed into law, the legal impediment to utilizing the CPSA over the FHSA could be removed. *See* p. 21 of this statement.

[4] My thoughts on this point are set forth in detail in a dissenting opinion issued December 22, 1975 regarding the Commission's decision to regulate certain kites and bats under the CPSA rather than the FHSA. [This opinion is reprinted as Appendix I, p. 347.]

[5] I have not discussed the banning procedures of section 8 of the CPSA because no cases have arisen in which the Commission has utilized this section. I regret this lack of use because I believe section 8 is an effective tool.

agency proceeding." Nevertheless, he argued that it was "probably mandated by our enabling statute."

As I understand the Chairman's argument, section 10 of the CPSA requires the Commission to develop a standard anytime a member of the public in a petition to the CPSC demonstrates that a product presents an "unreasonable risk of injury" even though the Commission believes that its resources should be devoted to products which present greater risks of injury.[6]

While I agree that an argument can be made in support of the Chairman's position, I do not find it particularly convincing nor do I see any reason for adopting such a self-defeating approach absent a conclusive judicial determination on the point.

I have read with great care the memorandum of the CPSC General Counsel requested by the Oversight Committee on this subject and find myself in agreement with the section that argues that the Commission can deny petitions seeking safety rules (i.e., standards or bans) on the basis of their relatively low priority.

In particular, I strongly agree with the argument that a determination that a product presents an "unreasonable risk of injury" must involve a consideration of CPSC priorities and resources. I find this argument far more persuasive than the section that argues the contrary position, i.e., that unreasonable risk determinations are independent of considerations of CPSC priorities and resources.

The latter section cites language from the House Report of the CPSA:

"[a]n unreasonable risk is clearly one which can be prevented or reduced without affecting the product's utility, cost or availability; or one which the effect on the product's utility, cost, or availability is outweighed by the need to protect the public from the hazard associated with the product." H.R. Rep. No. 1153, 92d Cong., 2d Sess. 33 (1972).

It cites similar language in the Senate Commerce Report:

"In those situations where either the degree of anticipated injury or frequency of such injury can be reduced without affecting the 'performance' or 'availability' of that class of consumer product, then almost any risk capable of producing injury, becomes unwarranted." S. Rep. No. 749, 92d Cong., 2d Sess. 14 (1972).

According to this section of the memorandum, the legislative history indicates that Congress expected only the frequency and severity of the risk of injury from the product under consideration to be evaluated and compared with the effects of regulating that product. Accordingly, any product which could be addressed with minimal adverse impact could be considered to present an unreasonable risk of injury and should be regulated.

I do not agree with this interpretation of the legislative history. This language cannot be considered an all-inclusive definition of the term "unreasonable risk of injury." It simply states a proposition that I find to be little more than common sense—that is, any risk addressed by the Commission that can be reduced with little or no adverse effect should be. Risks which, when reduced, will affect the utility, cost, or availability of a product should be reduced only to the extent that there is a need for public protection. In short, a "balancing" test is required.

However, the fact that Congress indicated that "balancing" should be utilized by the Commission does not mean that Congress thereby commanded the Commission immediately to work on *every* petition requesting CPSC action for products containing "unwarranted" risks irrespective of the level of risk involved. In my opinion, Congress simply made clear that "balancing" is *necessary* in the determination that a product presents an unreasonable risk of injury. Congress did not, however, make it *sufficient*. Other factors can be considered. Senator Moss' statement urging passage of the Conference Report on the CPSA confirms this point:

"While the full reach of the term 'unreasonable risk' will be left for the courts to decide, it is my hope that they will be guided by this important balancing test." 118 Cong. Rec. 18199 (1972).

Clearly, Senator Moss would not have looked to the courts for further refinement of the term if he believed that the "balancing" test were all-inclusive.

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[6] The Commission's denial of a petition for the issuance of a consumer product safety rule for fondue pots with removable handles seems to contradict the Chairman's argument on this point. The Federal Register denial stated, "although the petition described potential accident patterns which could result from the use of fondue pots with removable handles, the Commission concludes that its resources should be applied at this time to products causing more frequent and severe injuries than fondue pots." 38 Fed. Reg. 31758 (December 18, 1973).

The General Counsel memorandum also argues that confusion could result from unreasonable risk determinations utilizing product-by-product comparisons because a product not considered an unreasonable risk one day could become an unreasonable risk the next day "merely because the Commission has acted to reduce the unreasonable risk associated with another product."

I do not find this argument convincing. It strikes me that even without product-by-product comparisons, a product can easily be considered an unreasonable risk of injury one day and not the next. Any technological advance that renders a "widget" significantly safer at the same or a reduced price probably transforms all previous widgets into unreasonable risks. No major confusion results from this fact nor would it with product-by-product comparisons. The reason is simple. The Commission must always follow the procedures set forth in the acts it enforces and the Administrative Procedure Act. These acts require advance prior notice and provide ample opportunity for public comment before the CPSC may take regulatory action against products which it determines to be unreasonable risks. Given this fact, it is difficult to see how any confusion can arise. Thus, I cannot agree with the General Counsel's argument.

Even if a court should determine that unreasonable risk determinations are independent of priorities and resources, there is another argument based upon section 10 of the CPSA which, I believe, leads to the conclusion that these considerations are relevant in granting or denying petitions. Section 10 has a two-part test for persons challenging the denial of a petition. In addition to the requirement that a product present an unreasonable risk of injury, section 10(e)(2) requires a petitioner to demonstrate that the "failure of the Commission to initiate a rulemaking proceeding under section 7 or 8 unreasonably exposes the petitioner or other consumer to a risk of injury presented by the consumer product. . . ."

Although these words are not altogether clear, a fair reading of them is that a petitioner must demonstrate something more than the fact that a product presents an unreasonable risk. I believe the petitioner must also demonstrate that it is unreasonable for the Commission to exclude from its immediate priorities the product about which the petitioner is concerned.

Such an interpretation is buttressed by common sense. Congress gave the Commission jurisdiction over approximately 10,000 products. Congress obviously felt that the Commission could significantly reduce the injuries associated with a large number of these products. It would be illogical to assume that the Commission could address all of the products immediately. Priorities would have to be set to deal with the products presenting the greatest hazards. Given this, it would be nonsensical to permit an isolated petitioner, aggrieved by a product presenting a low priority hazard, to force the Commission to expend its scarce resources on the low priority matter thereby continuing the public's exposure to far more serious hazards.

A more sensible interpretation of section 10, in my view, is that Congress included it to ensure that the citizenry has a procedure to guarantee that the CPSC does not, for good or bad reasons, overlook matters of genuine importance. An example is the petition filed by the Natural Resources Defense Council (NRDC) requesting a CPSC ban on the use of fluorocarbons in propellants. Although the Commission had no evidence of injuries or illness associated with the product, NRDC alleged that its continued use would cause dramatic increases in death and illness from cancer in *future* years. NRDC's allegations, if true, would make Commission attention to the product a matter of immediate concern since only prompt action could prevent future harm. NRDC's petition forced the Commission to examine the issue at once.

It has been suggested that section 10(g), which provides that petitions filed during the three years after the passage of the CPSA cannot be the basis for the "mandamus-like" suits set forth in section 10(e), contradicts an interpretation that the CPSC may consider its priorities and resources in the granting or denying of petitions. In this view, Congress gave the CPSC three years to order its priorities before being "beleagured by everyone's pet peeve."[7] By implication, after the expiration of the three-year period, the CPSC could be so beleagured.

I do not agree with this interpretation of section 10(g). As suggested by the General Counsel memorandum, this section was designed to prevent any of the "mandamus-like" lawsuits during the three-year period. Thus, it freed the Com-

[7] Remarks of Representative Broyhill, 118 Cong. Rec. H. 9909 (October 13, 1972).

mission for three years from the need to expend its resources in defense of its priorities. It did not require the Commission to abandon priority setting at the end of that time.

SINGLE ADMINISTRATOR VERSUS COLLEGIAL BODY

As I read the words and legislative history of the Consumer Product Safety Act, it is clear to me that Congress strongly believed that the Commission should be "independent."[8] An agency that is independent is, by definition, free from outside "tampering" and, I believe, thereby better able to make decisions in the public interest. However, an agency that is independent may also be one that is free from accountability.

Of course, the term "independent" is relative. Although somewhat more independent than other regulatory agencies, the Consumer Product Safety Commission is, nevertheless, dependent upon the President, the Congress, the courts and the public in a multiplicity of ways. To that extent the agency remains very much accountable for its actions. But, these checks, while generally effective, are not structured to monitor the day-to-day operations of the Commission. Nor, in my opinion, should they be. To do its job properly, the Commission must be free to act decisively and flexibly. Further, it must have sufficient authority to make its actions meaningful. Without question, the CPSC does have sufficient authority.[9]

Given the broad powers and the relatively independent status of the CPSC, I find it difficult to entrust to only one person the authority to make all major decisions of the agency.

Moreover, I believe that fundamentally better decisions are likely when made with the "collective wisdom" of a group. This is especially so where the group consists of persons who are independent of the authority of other members and who can thereby speak forthrightly on issues.

Finally, it has been suggested that regulatory decisions are delayed by a collegial body. While this may be true in other agencies, it is manifestly not the case at the CPSC. Most Commission decisions are made within one week after a staff briefing package reaches the Commissioners and virtually all are made within two weeks.

Given these points, I strongly support the continuation of the collegial structure of the CPSC.

AGENCY "PHASEOUT"

While I appreciate the Chairman's boldness and creativity in conceiving a plan to "phase-out" the CPSC by 1982, I do not believe it is realistic.

First, the plan addresses only injuries that the Chairman characterizes as "standards-preventable." According to the Chairman's most liberal estimate, 25 percent of the injuries associated with consumer products are of this type. The plan ignores the other 75 percent. Contrary to the implicit assumption of the Chairman, there are means for addressing these other injuries. Well-conceived information and education programs conducted on an ongoing basis in accordance with the Commission's mandate in section 2 of the CPSA can upgrade consumers' purchase and use behavior. For example, I believe that a good bicycle safety education program designed to teach proper use of this product could easily prevent as many injuries as the safety standard.

Second, the plan, as I understand it, addresses the problem of *new* products by relying on generic standards, i.e., regulations that cover hazards common to many products. While I strongly endorse the use of generic standards, I think the Chairman's plan overestimates the ability of the CPSC—or anyone—to draft truly comprehensive generic standards. The Commission's attempts to draft

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[8] For example, under the Act, the Chairman, once appointed remains Chairman for the duration of his or her term; the Commission is required to submit its budgetary and legislative requests simultaneously to Congress and the Executive Branch; Commissioners may be removed from office only for "neglect of duty or malfeasance in office." These are important departures from traditional agency legislation and, as I view them, provide insulation from domination by the Executive Branch.

[9] The CPSC can issue mandatory safety standards which in some circumstances could force companies to completely redesign their products. It can ban a product from the marketplace where it decides no feasible safety standard would adequately protect the public. Should the CPSC determine that a product presents an imminent risk of death or serious injury, it is authorized to go into a United States District Court to seek an injunction to halt the sale and distribution of the product. Under section 15 of the CPSA, all manufacturers, distributors and retailers are required to notify the Commission whenever they obtain information that a product manufactured or sold by them contains a defect which *could* create a "substantial risk of injury." Violation of CPSC orders and regulations may subject a person or company to substantial civil or criminal penalties.

sharp point and sharp edge standards for toys, for example, have taken several years and several drafts and, according to certain toy industry critics, are still overbroad. I doubt that it will be easy to apply them across-the-board for all consumer products. Similarly, I doubt that other generic standards can automatically be made applicable to all new consumer products.

Third, the plan ignores the fact that safety standards—even generic ones—often have to be revised to reflect changing product technology. For example, the architectural glazing standard, although drafted in performance terms, nevertheless contains tests reflecting the fact that several different glazing materials which the Commission has concluded are acceptable for safety purposes break in sufficiently different patterns that separate passing tests are required to deal with them. It is quite conceivable that this standard would have to be modified should an entirely new form of glazing material be developed.

Finally, to be effective, safety standards must be enforced. The Chairman's plan apparently relies on the combined forces of product liability litigation and voluntary industry action to ensure compliance. This country's experience with these two mechanisms leaves me skeptical that government can very easily abandon the enforcement field.

BUDGET

The budget is obviously one of the most important documents prepared by the Commission since its preparation inevitably requires the determination of which activities will be undertaken by the agency and which will not. I thus greatly welcome the impending change in the budget process contained in H.R. 6844 and S. 644 which will require full Commission approval rather than simple approval by the Chairman before the budget can be submitted to OMB and the Congress.

I am troubled by the Chairman's statement in his answers to the Oversight Committee's questions on the budget. He states that the "budget requests and justification documents have been sent to the Commissioners both for their information and review." While this is technically true, I believe that it may be somewhat misleading since, except for the FY '75 budget, these documents were sent to me only simultaneously or after their submission to OMB and the Congress. Obviously no meaningful input can be provided at such a point. I raise this matter only to make clear that the budgets submitted and defended by the Chairman have reflected his ordering of priorities and not mine.

SECTION 701(e) HEARINGS

Under the Federal Hazardous Substances Act (FHSA), procedures for the issuance, amendment, or repeal or regulations under section 2(g)(1)(B) of that Act are governed by section 701(e) of the Food, Drug, and Cosmetic Act. 21 U.S.C. § 371(e).

Section 701(e) requires the CPSC, upon objection of any interested person, to hold formal evidentiary hearings before finally promulgating regulations. Detailed findings of fact based solely on the record must accompany the regulations, and such findings are subject to judicial review to determine whether they are supported by substantial evidence. This type of rulemaking is not typical. Most of the Acts enforced by the CPSC and other agencies require only the procedures of the Administrative Procedure Act (APA) (5 U.S.C. § 553). Section 553 of the APA provides ample notice and opportunity to comment on proposals by those affected by rulemaking yet is also simple and efficient.

By contrast, section 701(e) requires procedures that guarantee endless delay. Proceedings under this section have taken as long as ten years from the formulation of the original proposal to the actual effective date of the regulation. According to one critic, the 701(e) procedure "which involves all the steps of an informal rulemaking procedure under section [553] of the Administrative Procedure Act and most of the steps of a formal adjudication, certainly must set some sort of record for cumbersomeness." [10]

For some time I have advocated the repeal of the requirement that these overly lengthy adjudicatory hearings be held for bans under section 2(q)(1)(B) of the FHSA.[11] Instead, I would substitute procedures similar to those set forth

[10] Hamilton, Robert W., "Rulemaking on a Record by the Food and Drug Administration," 50 *Univ. of Texas Law Rev.* 1132, 1137 (1972).

[11] On March 6, 1975, the Commission approved a set of amendments to be proposed to Congress for the CPSA. I dissented from part of that decision because I thought the Commission should have included an amendment to the FHSA to make optional the requirement for 701(e) hearings. *See* Separate Statement, Hearings before the Subcommittee for Consumers of the Committee on Commerce, United States Senate, 94th Cong., 1st Sess. 337 (April 18, 1975).

in section 9(a)(2) of the CPSA. In the absence of such repeal, I strongly endorse the drafting of "summary judgment rules" similar to those adopted by the Food and Drug Administration. 21 C.F.R. 130.12(a)(5). Such rules would expedite hearings where little factual dispute exists and would avoid the necessity of prolonged proceedings.

In addition to the drafting of summary judgment rules, I believe a new solution has arisen with respect to 701(e) hearings. It seems likely that an amendment to the CPSA in H.R. 6844 and S. 644 will soon be enacted which will permit the Commission to proceed under the CPSA in lieu of the FHSA upon a determination that such action is necessary and in the public interest. It is my hope that the Commission will freely utilize this provision whenever it considers regulatory action for products that fall under 2(q)(1)(B) of the FHSA. I would not hesitate to use this section to avoid the necessity for 701(e) hearings.

Section 25(a) of the CPSA

Section 25(a) states that "[c]ompliance with consumer product safety rules or other rules or orders under this Act shall not relieve any person from liability at common law or under State statutory law to any other person."

The Chairman asserts in his testimony that this section forecloses companies from citing their compliance with existing consumer product safety standards in the course of product liability actions.

I do not agree with the Chairman's interpretation. I believe section 25(a) merely restates the general rule that compliance with a statutory standard is admissible to show *some evidence* of due care but is not conclusive on the issue. *See, Raymond v. Riegel Textile Corporation*, 484 F. 2d 1025, 1027 (1st Cir., 1973); *LaGorga v. Kroger Co.*, 275 F. Supp. 373 (W. D. Pa. 1967); Swartz, Edward, *Hazardous Products Litigation* (1973).

The reasoning behind the rule is that statutes embody minimal standards and that complying products may still be negligently designed and manufactured, or unreasonably dangerous within the meaning of section 402A of the Restatement of Torts, 2d. Swartz, *supra*, at 63.

I agree with this general rule in the context of CPSC standards. Such standards are and should be relevant to a product liability action. However, compliance with standards should not be a conclusive defense to such actions. I say this because CPSC standards cannot always be counted on to reduce all unreasonable risks associated with a product. For example, I believe that the Commission's standard for swimming pool slides is not technically adequate to protect consumers from the risk of paraplegia and quadriplegia. If injuries are reduced by the standard, I will be extremely gratified. Should future injuries occur, however, I think it would be terribly unfair to permit the manufacturer to escape liability simply and solely because of the manufacturer's compliance with the standard. The manufacturer should be permitted to demonstrate compliance with the standard but the parties should also be permitted to argue the merits of the standard and the hazardousnes of the product notwithstanding the manufacturer's compliance.

Release of Legal Memoranda

As indicated in my testimony before the Oversight Committee on February 19, 1976, I believe that the Commission has unfairly disadvantaged both its legal staff and the public by releasing memoranda setting forth the strengths and weaknesses of various legal strategies to the public. I have included for the record a copy of a recent opinion which expresses my thoughts on this subject.

Conclusion

One may properly ask what the Commission has done to reduce injuries during its brief existence. According to many of its critics, the answer is that the CPSC has done disappointingly little. They point particularly to the fact that only one safety standard has been issued under the CPSA and that this standard addressed swimming pool slides, a product associated with relatively few—albeit serious—injuries.[12]

This criticism, although not entirely without merit, overlooks the fact that the CPSC enforces not only the CPSA but several other Acts—the Flammable

[12] 41 Fed. Reg. 2742 (January 19, 1975). As indicated before, I dissented from the Commission's decision to issue this standard because I do not feel that it is technically adequate to protect consumers from the risk of paraplegia and quadriplegia.

Fabrics Act (FFA), the Federal Hazardous Substances Act (FHSA), and the Poison Prevention Packaging Act (PPPA)—under which a number of extremely important standards have been issued. Included among these are standards for bicycles, fireworks, cribs, nonflammable children's sleepwear, and child-resistant packaging. One would be correct in pointing out that predecessor agencies such as FDA began work on some of these standards before the Commission began operation. But in the same vein, succeeding members of the Commission will benefit from standards-development work being done by current CPSC members.

In short, while the agency may not be perfect, it is far from the ineffective and insensitive bureaucracy that some critics allege it to be.

[The enclosures to Commissioner Pittle's statement are reprinted as Appendix E, p. 305.]

Mr. Moss. Thank you.

Are there any other views?

Commissioner Franklin.

STATEMENT OF BARBARA H. FRANKLIN, COMMISSIONER

Mrs. Franklin. Mr. Chairman, I want to say simply I am pleased to be here this morning before you and before the other members of this subcommittee. I have never failed to walk out of a hearing which you have conducted without having many things to think about for a considerable period of time.

I trust that this day will be very much the same.

I have no prepared statement to make. There are a couple of areas that I am hopeful we can touch on in the dialog.

Mr. Moss. Would you like to reserve at this point in the record the opportunity to submit a statement?

Mrs. Franklin. Yes, I would.

Mr. Moss. Without objection it is so ordered.

Mrs. Franklin. The kind of areas I am concerned about generally fall in the independent versus accountability question.

I think it is within that context that the whole dialog about the single administrator and collegial body must fit. The offerer process is obviously crucial, as is our enforcement capability, as well as the budget process and the Commissioner's current nonrole in it, according to the law. This concerns me deeply.

Also, the self-destruct mechanism for this agency and other areas are of concern. I shall submit a statement and will be happy to answer your questions.

Again, I am delighted to be here.

Mr. Moss. Thank you.

[Commissioner Franklin subsequently submitted the following statement for the record:]

Statement of Barbara Hackman Franklin, Commissioner, Consumer Product Safety Commission

Many important issues have been touched on during these oversight hearings, and I am pleased to have this opportunity to submit some additional views for the record. This statement emphasizes those issues I consider to merit special attention.

The Committee's goals in these hearings are extremely important. Gaining a better understanding of the workings and leadership of each independent regulatory agency is fundamental to achieving certain regulatory reforms.

It is within this context—regulatory improvement—that many comments on the Consumer Product Safety Commission (CPSC) are offered for your consideration.

INDEPENDENCE AND ACCOUNTABILITY

Independent regulatory agencies continue to pose a dilemma. They exist to protect the public interest, yet their responsiveness and accountability to the public are not clearly and directly assured.

Independent agencies often exercise quasi-Executive, quasi-Legislative, and quasi-Judicial functions. Yet it is not entirely clear to which branch of government, if any, they are or should be accountable in the exercise of these functions. Or, are such agencies, as their names imply, truly independent and, as such, more of a hidden fourth branch of government?

Members of this Committee have been emphatic in stating that independent agencies are branches of Congress. Still, independent agencies, personnel and budget expenditure systems (although this is slightly less true for CPSC) remain tied to the Executive branch, thus fuzzing the question of the branch to which they belong.

One result of this fuzziness is that there is no mechanism currently in force which provides day-to-day or even month-to-month accountability to help assure that what these agencies do—or don't do—serves the public interest. Periodic Congressional oversight and Congressional deliberations regarding agencies' budgets certainly are the most important mechanisms. But they usually occur on a somewhat delayed basis—often long after actions which might be questioned have occurred.

Clearly, CPSC's openness policy helps to make the agency accountable to the public it serves.

But still, I, as one regulator, would welcome new or improved mechanisms to provide direct and systematic feedback about whether the public thinks it is being well served by my actions and those of the CPSC.

COLLEGIAL BODY VERSUS SINGLE ADMINISTRATOR

A related issue is which type of decision-making is preferable for independent agencies—collegial body or single administrator.

One can argue that anything done by a group is more inefficient than if done by one person. There may be some truth in this. But efficiency is not the only way to serve the public interest. Regulatory decision-making and action that is rational and fair is at least as crucial as timeliness.

In the case of an independent agency, a variation of the old adage that "two heads are better than one" applies. When a majority must agree that a given action or policy is needed, there is less likelihood that the agency's actions will be irresponsible, arbitrary or unfair. In my view, the presence of this "check" is especially critical if an agency is independent since an independent agency is by definition less than clearly accountable to the public.

The worst of all possible words would be the hypothetical situation where a single administrator—a non-elected person with a fixed term—of an independent agency were incompetent capricious, or erratic. With few checks on his power, the public could be very badly served.

THE BUDGET

The budget is the Commission's most important policy document, and as such, is an area where some decision-making "check" is clearly in the public interest.

Under the Consumer Product Safety Act, responsibility for the budget lies solely with the Chairman, unlike other independent regulatory agencies where the Commissioners have the explicit authority to approve or disapprove the budget request. At CPSC, exclusion of Commissioners from this process has dramatically undercut, I believe, our ability to set Commission priorities and responsibly make regulatory decisions within the context of applying scare taxpayers' dollars in the best ways possible to achieve safer products and safer people.

Concern about this has led to the Commission's recommending a legislative amendment to the Consumer Product Safety Act, to provide Commissioners an explicit role in the budget process. Both the Senate and the House have approved the amendment; it is contained in S. 644, a bill which is in House-Senate Conference and which I strongly hope is passed.

If enacted, this provision will provide the decision-making check the public interest deserves and help to avoid the possibility that a majority decision on a regulatory matter could be neutralized or negated because the Chairman directed the agency's resources into other areas.

THE OFFEROR PROCESS

One of the crucial issues that must be considered in any discussion of rule-making and regulatory improvement is the "offeror process" under Section 7 of the Consumer Product Safety Act—and the way it has worked.

I support the thrust of this section of the law—it places the burden for development of standards on the private sector, and not on the government. The Commission, of course, makes the final decision whether to propose and adopt a standard developed in this manner.

I believe the offeror process is a unique, new method of regulatory development for government. It guarantees public participation in ways and with a scope that no other standards process in government or elsewhere comes close to matching. And it is producing, in some cases, real innovation in standards themselves, as we learn to regulate safety *performance*, not product design. Thus, the offeror process encourages creativity, both by the private sector—and by the Commission's own staff.

The offeror process is now being criticized—as being too slow, as producing draft standards of low quality, or as simply not working.

Concern about how the process works is justified. But let's not over-react and discard the idea. Instead, let's set about improving the way it works. Until we do this, I think it's entirely premature to ask Congress to amend or to repeal Section 7. It is, however, high time for the Commission to set about analyzing how Section 7 has worked, what the strengths and weaknesses in its implementation are, and how it can be made to work better.

First, for example, we can improve the substance of the Federal Register notices of need—the method by which a proceeding to develop a standard is begun. It may mean improving our descriptions of identified risks of injury and reasons why the Commissioners think those risks are unreasonable. In short, if we can be more precise in describing safety problems, perhaps offerors will be less prone to challenge the need for a standard and more creative in finding solutions.

Also implicit may be the need for the Commission staff to do more "front-end" technical research to help set the stage for the standards development process.

Second, we should continue to improve the process by which an offeror is selected. Admittedly, our early approaches were sometimes awkward and sometimes gave rise to considerable confusion. Since that time, we have learned much—especially about the need to communicate more clearly and fully with potential offerors. The selection process is working more smoothly, but this is an area which we should continue to look into to see whether further improvements can be made.

Third, the Commission should consider issuing guidelines for offerors on how best to go about developing a standard. Does a committee structure work best? If so, what should the composition of development committees be? Should there be voting? By whom? On what issues? Is consumer input more crucial at certain points in the development process? These are just a few of the many questions which should be addressed.

Fourth, another issue deserving full Commission attention is our policy regarding contributions to an offeror's costs. Based on our experience to date, I believe we should reassess the kind and amount of contributions the Commission should make toward costs incurred by the offeror. I particularly want to look more closely at the issue of whether "salaries" should be paid to consumer participants to ensure adequate consumer participation.

A related matter concerning Consumer's Union's recent experience as an offeror for the power lawn mower standard also deserves Commission attention. CU has indicated that their work was so extensive that they need an additional $84,000 for services rendered. Further, due to the costs involved, they question whether they can afford to undertake such an effort again. Can any consumer group, non-profit organization or professional society afford to manage development of a mandatory safety standard? If not, then what precisely is or should be the Commission's role in helping to assure that potential offerors are on some kind of equal footing?

Fifth, I think the role the Commission plays in the actual development process—vis-a-vis the offeror—is still evolving and needs more precise definition. Initially, the Commission's staff was prohibited from active participation in an offeror's conduct of the process.

Over the past few months, this has changed. Staff is now permitted to more directly and actively contribute to the process. I believe it is now appropriate for the Commissioners to develop guidelines describing how the staff may more actively guide the offeror's progress and when staff will report major problems to the full Commission.

Sixth, it appears to me that many are unrealistically judging the speed of standards development under Section 7. The Act's original 210-day time frame is simply too short—given the complexity of the technical and economic concerns which must surround every standard developed for the Commission. As a result, the Commission has extended the development time for every standard and has asked Congress to legislate a longer statutory time period.

A special concern—in addition to the time the offeror needs to do the job—is how much evaluation time, from a technical standpoint, the Commission should allow itself. Even if an offeror were to complete a draft standard in 150 days, the Act says the Commission must decide in the remaining 60 days of the 210-day period whether to propose the standard or stop the proceeding. Does this provide adequate time for sound technical evaluation by CPSC? Or, should such evaluation occur as the standard is being developed? Or, should it go on during the time the proposed standard is out for comment? Or, what?

Despite some criticism, it should be noted that the Commission's offeror process is producing product safety standards faster than any other mechanism inside or outside the government. Therefore, while we should aim to speed up the process whenever possible, the real questions are not so much timing, but whether the standards developed under Section 7 will really do the job in eliminating unreasonable risks of injury.

In short, the Section 7 process is unique and well worth greater efforts to make it work even better, as the Congress envisioned when the law was written. No matter how dedicated CPSC's staff, the government simply doesn't have a corner on all the wisdom about product safety standards. If, as some suggest, the offeror process is eliminated to "let the government do it," I believe that over time, the ability of the public to participate in a meaningful way will be severely—although unintentionally—eroded.

VOLUNTARY SAFETY STANDARDS

Voluntary safety standards also warrant discussion here. Long range, what is done or not done in this area may be a critical determinant in whether product-related injuries are prevented in any significant degree. Clearly, voluntary efforts in this regard should complement and be compatible with the development of mandatory standards. And, they should grow in importance.

I believe the Commission should allocate more staff and dollar resources to stimulate and guide the voluntary standards effort. If the government can help provide incentives for the private sector to eliminate product safety problems early—in part, by developing voluntary standards—we can get more mileage out of Commission resources.

Just a few examples where constructive efforts appear to be underway—possibly preventing accidents without the necessity for regulatory intervention—include: bathtubs and shower stalls, hedge trimmers, high chairs, ladders, ranges and ovens, fences and carbonated beverage bottles.

PETITIONS FROM THE PUBLIC

Section 10 of the Consumer Product Safety Act, which allows any interested party to petition the agency to set a safety rule, is another provision which has been criticized. It has been characterized as being unwieldy and as tying up Commission resources on safety problems which may not be particularly serious.

I think this criticism threatens to close another doorway which Congress gave the public to make the Commission accountable and ignores Section 10's constructive role in helping the Commission to achieve its mission.

A case in point is public playground equipment. Elaine Butwinick, a Washington, D.C. schoolteacher, petitioned the Commission to require safer equipment. The Commissioners quickly granted the petition, and work is now underway on a mandatory standard.

In short, one consumer, concerned about the serious injuries she felt children sustained from public playground equipment, stimulated action by the government. To deny the public this kind of access to the Commission would be, I think, counterproductive.

Furthermore, if there are indeed problems with the petitioning process or the resources devoted to it, the problem is not the Section 10 language, but rather the way that section is being implemented and managed.

It should be noted that the Commission has, in at least one instance (fondue pots, CP 73–4), denied a petition on the grounds that it would divert resources which should be used for more pressing product safety concerns. Saying this another way, I do not believe the law inhibits our flexibility to deny petitions if the result of granting them would be an unwise use of scarce resources. However, denying petitions for this reason means that a majority of the Commission must be in fundamental agreement about Commission priorities and use of resources. Thus, more effective implementation of Section 10 depends at least partly on Commissioners having an explicit role in determining CPSC's budget.

In sum, I believe the public's right to petition the Commission must be preserved and strengthened. Section 10, as written, is sound, responsible and enables the public to bring to the government's attention those issues they see as important.

ENFORCEMENT OF CPSC REGULATIONS

Without strong enforcement, any Federal agency becomes nothing more than a "paper tiger."

Believing that the Commission must have a strong enforcement capability if we are to administer adequately the laws within our jurisdiction, I have two concerns about its effectiveness at our agency.

First, some have been prone to criticizing the Justice Department's treatment of our criminal cases. It is said that Justice has not handled Commission cases expeditiously and that some cases for which we recommended prosecution have been rejected.

There may be some truth to these observations; however, we should also look to see if our own house has been in order.

The fact is that extensive, unnecessary delays by this agency in developing and forwarding its cases to Justice frequently has been a decisive factor in the refusal to prosecute. (Such delay is the subject of my January 27, 1976 opinion regarding a recommendation for prosecution in a particular case. A copy of this opinion is attached.)

However, this Subcommittee should be aware that CPSC has instituted efforts to speed up processing of cases, that they appear to be working, and I believe this kind of improvement can be expected to continue. Anything less than fair and fast action by the Commission when a violation occurs is simply unacceptable, in my judgment.

Second, we should avoid any unreasonable overkill in enforcing our laws. Our primary enforcement goal should be to get unsafe products rapidly out of the hands of consumers and off the market.

We should not delay, therefore, acceptance of consent agreements just to linger over some minor issue which is not critical to protecting the public.

A case in point is the Matter of *Bay Area Mattress Company* (Docket No. CPSC 75–2). For over a year, the Commission delayed warning consumers about non-complying mattresses, which may have been flammable, in order to pursue a relatively minor issue in a formal adjudicative proceeding. The text of my March 26, 1976 dissenting opinion on this issue is attached.

CHRONIC HAZARDS

In another area—chronic hazards—it has been suggested that the Commission should seek to have its jurisdiction and authority repealed.

I find it difficult to understand who would benefit from such a decision. It would compound the maze of overlapping regulatory jurisdiction—both consumers and industry could be greatly puzzled at which government agency to approach in product safety matters.

At this point, the Commission does not have the sophisticated research capacity that some other agencies have developed—but I do not believe we need to have it in-house. The private sector and other Federal agencies are creating a solid base of research data on chronic hazards. The Commission has the authority to gain access to such data, and has used the results of such research in the past, as the need arose.

I favor the Commission's retention of jurisdiction over chronic saftey hazards associated with consumer products. I also favor improved mechanisms, as needed, which allow one Federal agency to act as the "lead" sponsor of research, the results of which several agencies may use.

THE 1982 SELF-DESTRUCT PLAN

Before concluding, I want to direct a few comments toward the 1982 self-destruct plan presented to this Subcommittee and proposed in the Chairman's FY 1977 budget request.

Apparently, the plan provides that if 100 mandatory safety standards are promulgated over the next five years, the need for the agency's existence would be eliminated, and it could die.

There is no doubt that it is excellent for any independent agency—such as the Commission—to periodically justify its continued existence on the basis of progress toward its central mission. Clearly, better measures need to be found to evaluate an agency's effectiveness.

But a blithe statement that CPSC should self-destruct after having promulgated 100 standards which "eliminate 75% of all preventable (product-caused) injuries" is, at best, misleading.

Mandatory standards are an important means to eliminate unreasonable risk, but to overstate their role is shortsighted.

First, too much reliance on mandatory standards ignores the role human factors play in accidents. And, in many accidents, the human factor is absolutely paramount. The Commission has estimated that approximately 83% of product-related injuries are at least partially human-caused. Therefore, even if the Commission were to promulgate 100 mandatory standards, I do not believe we could substantiate a claim that most "preventable injuries" would be eliminated.

Second, this "plan" apparently does not consider that new consumer products are constantly entering the marketplace. Ten years from now, the 100 standards of today could deal with obsolete products.

Third, the "plan" also appears to assume that industry will take little voluntary initiative to solve important safety problems, an assumption I certainly hope to be invalid.

Lastly, the "plan" emphasizes mandatory standards development—apparently, at the expense, at least in part, of CPSC's enforcement effort. It is inappropriate, in my view, for the government to issue regulations it does not intend to enforce.

There is no doubt that mandatory standards are an important tool to eliminate unreasonable risk—but they are not the Commission's only tool, nor should they be. It seems shortsighted to me to put all CPSC's eggs in one basket, neglecting the other purposes laid out in the Act—research and investigation into the causes and prevention of product-related injuries, assistance to consumers in evaluating the comparative safety of consumer products.

The Commission should have a balanced, fair approach to solving product safety problems—choosing that action, or combination of actions, which will best remedy the problem. Such action may—or may not be—a mandatory standard.

CONCLUSION

Let there be no mistake: I believe this agency has laid the groundwork to resolve the nation's product safety problems.

There are many notable successes:

The way *Section 15* has worked to correct almost 4 million units of potentially unsafe products.

The way *Section 7* has begun to work. Despite some very real problems—which I believe the full Commission can help to resolve—the fact is that Section 7 can also be termed a success. We can make it work better, to be sure, but nevertheless, it is now producing some standards which I hope will go far in helping to reduce unreasonable risks of injury at a reasonable cost to consumers.

The increased safety awareness among industry and consumers. Our information and education programs are raising the level of safety consciousness in this country. And not just for consumers. Industry's safety consciousness is also clearly increasing. The growing emphasis on quality control, establishment of systematic mechanisms for recalls, and involvement in voluntary standards are just a few examples.

The emphasis on public participation and openness. The Consumer Product Safety Act certainly handed us a number of opportunities in this regard, but I believe the Commission's own policies on public involvement and openness are unprecedented.

In conclusion, I am optimistic that the Commission—working with industry and consumers—can eliminate and reduce many of the unreasonable risks of injury associated with consumer products.

We have begun. Clearly, there is much left to do. We need to accelerate the pace—we need to aim for concrete results. The challenge—and the opportunity—is to use our resources carefully, to achieve our mission responsibly.

I sincerely hope that we do reduce the unreasonable risks of product-related injuries—rapidly, at a bargain price to taxpayers and consumers. That is the result which I hope Congress will use to judge the Commission's regulatory performance and regulatory lifetime.

[The enclosures to Commissioner Franklin's statement are reprinted as Appendix F, p. 331.]

Mr. Moss. Mr. Kushner.

STATEMENT OF LAWRENCE M. KUSHNER, COMMISSIONER

Mr. KUSHNER. Mr. Chairman, I enjoyed reading and hearing Chairman Simpson's statement this morning and support the bulk of it.

There are a number of areas in which I have different views from the Chairman. I would hope to have the opportunity as our discussion proceeds today to make several points and would ask for the opportunity to submit a statement for the record.

Mr. Moss. The record will be held at this point to receive such a statement.

Mr. KUSHNER. Thank you.

[Commissioner Kushner subsequently submitted the following statement for the record:]

STATEMENT OF LAWRENCE M. KUSHNER, COMMISSIONER, CONSUMER PRODUCT SAFETY COMMISSION

Mr. Chairman:

I welcome the opportunity to submit for the record these comments on several issues raised during the hearings of this Subcommittee on January 30 and February 19, 1976, in oversight of the Consumer Product Safety Commission. I understand that these hearings were held as part of a contemplated series of such hearings with the regulatory agencies and reflect the Subcommittee's interest in regulatory reform. Having been enacted as recently as 1972, the Consumer Product Safety Act must, itself, be seen as embodying a number of elements of regulatory reform. I would like to present my comments in this larger context.

ISSUES RELATED TO INDEPENDENCE

The basic concept of the independent agency is clearly one on which Congress has strong positive views. The Consumer Product Safety Commission was not only established as an independent agency, but several features to strengthen its independence were incorporated in the Consumer Product Safety Act. Chairman Simpson has commented on the ambiguous position of the independent agencies on a governmental organization chart, believing that adequate checks and balances are lacking. In my view, the accountability of this Commission is neither lacking nor unclear. As a "trade-off" for its independence, CPSC is, rather than being *un*accountable, multiply accountable—to the President, through the nomination of Commissioners and his budget recommendations; to the Congress, through confirmation of the Commissioners, appropriation of funds and legislative oversight; and to the courts, through review of its actions. Such multiple accountability may not be easy for an agency to live with but it is hardly unclear.

If a regulatory agency is to be given as much independence as this agency has, it is essential that its major policies and programs as well as its regulatory actions be the subject of collegial body decisions. This Commission can, under threat of sanction, impose limitations on the actions of manufacturers, distributors and retailers. These limitations can result in increased costs to consumers as well as restricted choice in the marketplace. These are decisions not to be made by one individual, no matter how competent or well-intentioned, enjoying extended tenure in office. They should reflect a concensus based on the judgments of individuals representing a variety of views on public policy and different areas of specialization or expertise.

Admittedly, the Chairman's job is made more difficult by being constrained to act consistent with decisions of a 5-member Commission. It is my perception that the main difficulty encountered in this respect by this Commission has been the result of lack of precision in the Consumer Product Safety Act in specifying those functions of the Commissioners that would constitute establishing overall policy guidance—in particular, the role of the Commissioners in formulating the budget, which is, after all, the principal reflection of policy. The Commission has recommended an amendment to CPSA which would make it clear that approval of budget estimates requires a vote of the full Commission. As to the ability of a 5-member Commission to make regulatory decisions expeditiously, the Chairman's testimony that nearly all such decisions are made within two weeks of the Commissioners receiving "briefing packages" from staff is evidence that decision-making by the Commissioners is not a major factor in determining the rate at which CPSC has functioned.

Among the provisions of the CPSA which are intended to enhance the Commission's independence, that permitting direct communication between Congress and the Commission on budgetary matters is surely among the most important. Chairman Simpson expressed the opinion that White House displeasure with this provision may well underlie the unfavorable budgets being recommended by the Administration for the Commission over the next few years. While I can neither confirm nor deny this, I do believe that the principle reflected in Section 27(k) is fundamentally sound and that it should be possible to work out operational procedures that will continue to give Congress the information it needs to correctly evaluate the budgetary requirements of this Commission, yet permit the Executive Branch to retain those elements of confidentiality in interagency communications that it holds to be important.

ISSUES RELATED TO PUBLIC PARTICIPATION

Another aspect of regulatory reform incorporated in the CPSA are its provisions to bring the public into the regulatory process to a greater extent than ever before. Section 7, the offeror process, and Section 10, requiring the Commission to act on petitions within 120 days with its subsequent decision reviewable in court, were much discussed at the hearings. I believe they are both fundamentally sound.

The offeror process has been criticized as taking too long. I ask, "Compared to what?" It is slow when compared to the timetable written into Section 7. Events have shown that schedule to be unrealistic if one is to provide for public input in substance as well as in form. The offeror process is not slow as compared to the rate at which other safety regulations are developed by the government, nor is it slow as compared with the development of standards, even without controversy, in the private sector.

The quality of the proposed standards being submitted to the Commission by the offerors has been called into question, the implication being that it is reasonable to expect a finished standard from the offeror. The result of the offeror's efforts should not be regarded as more than a first draft. The Commission is not bound to use the offeror's proposal as submitted. The Commission can and has modified an offeror's proposed standard when it was found to be seriously deficient. But this isn't always the case. In the instance of matchbooks, a totally unexpected, useful and novel approach was stimulated by the offeror—the burn length/burn time requirement. In my view, the offeror process has been neither outstandingly successful nor unsuccessful in giving the Commission a first-draft standard. Whether or not one does away with, or dramatically alters, the process after such a brief history is fundamentally a test of one's view of public participation in the regulatory process. Should it be encouraged at the earliest stages of regulation writing or should it be, as in the past, primarily in response to a government-generated proposal? I cast my vote for early and continuous participation.

Are the Commission's policies for funding the offeror process the best ones? The Commission's policy to pay travel expenses and per diem for consumer participants on offeror committees has resulted in participation by a good cross section of consumers, from homemakers to engineers. The consumer participants themselves have not supported the idea that the Commission should pay the equivalent of salary in order to get consumer participation. The Commission has provided technical expertise to support the offeror's committees as needed. To provide special technical support to certain groups of participants could well be a disruptive rather than a constructive measure. Technical support requested by a full committee or subcommittee should continue to be made available by the Commission.

On the subject of offeror costs, a flexible approach is needed. Many industry

associations have standards-writing as one of their functions and have trained staff to administer the process. Consumer service organizations such as Consumers Union and Consumers Research, although nonprofit organizations, are self-supporting with salaried scientific, technical and professional personnel, supporting staff, laboratories and equipment. I see no need in such cases for the Commission to give financial support beyond that associated with public participation. Where the offeror has no resident capability to administer the process and has no resources with which to obtain it, the Commission has been more generous. A real problem in this regard has yet to be demonstrated.

On the matter of petitions, I believe that modification of Section 10 is premature and at this time would be unfounded. Since October 28, 1975, the rate of receipt of petitions by the Commission has not increased perceptively. To the extent that Commission management has experienced difficulty handling petitions, it would appear to be an internal policy/management matter that can be dealt with on that basis rather than requiring a change in the law.

THE TRANSFERRED ACTS

In my view the single most important factor in making the Commission's day-to-day operations more complicated than they need to be, and less efficient than they can be, is having to operate under the transferred Acts as specified in Section 30. The time consuming and expensive jurisdictional battles over cigarettes and handgun ammunition are simply highlights in a continuing series of skirmishes on jurisdictional issues. Nearly all have involved products that are under the jurisdiction of both the Federal Hazardous Substances Act and the Consumer Product Safety Act, in particular those items that are used by both children and adults. The issue is whether such products must be regulated under the Federal Hazardous Substances Act Toy Safety Amendments or can be regulated under the Consumer Product Safety Act. In my view, the Toy Safety Amendments of 1969 were a stopgap measure to deal with hazardous children's article while Congress was working toward omnibus consumer product safety legislation. Congress' later, and presumable more complete, views on how consumer product safety should be regulated are reflected in the Consumer Product Safety Act, and it seems to me that the Consumer Product Safety Act should be used preferentially in all cases in which it can be justified. Clearly in light of Section 30(d), it cannot be used for toys as one ordinarily thinks of them or for other articles intended exclusively for use by children. But in those cases where the article to be regulated enjoys substantial use by adults as well as by children, I believe that regulation under the broader, more flexible and more comprehensive provisions of the Consumer Product Safety Act is desirable and justifiable.

The fact that the Commission must administer these transferred Acts makes it difficult to set up and manage a single set of priorities. Procedures under each of the Acts are sufficiently different as to require separate sets of experts. Advisory committees under each of the Acts show little willingness to be satisfied with resource allocation that can be perceived as downplaying the importance of the particular Act on which the Committee advises. Finally, it is difficult for the public to perceive just how the Commission operates when it must do so differently for different kinds of products.

There is no question but that each of the transferred Acts may have certain provisions that in specific circumstances may be "better" than the equivalent in the Consumer Product Safety Act. On balance, however, I believe that the benefit to the public of these deceptively attractive multiple options is far outweighed by their cost in terms of administrative inefficiency.

No single action by the Congress could help improve the efficiency and effectiveness of this Commission more than repealing the transferred Acts and putting all of the affected products under CPSA jurisdiction. This need not mean the loss of any existing regulations under these Acts. They could be recodified under CPSA. This should become a goal of the Consumer Product Safety Commission and its legislative oversight committees.

Mr. Moss. Mr. Robert Brown, our counsel.

APPROPRIATENESS OF CONSUMER PRODUCT SAFETY COMMISSION MISSION

Mr. Brown. Chairman Simpson, as you know the hearing this morning is not only part of the subcommittee's oversight functions

but it is also one of a series of hearings we are having as part of our ongoing regulatory reform study.

Consequently, we are asking each agency that appears at these oversight hearings to address itself to some of the broad issues of regulatory reform that are now the topics of public debate as well as questions pertaining to the particular agency.

Along this line I would like to start off by asking you how you view the appropriateness of your Agency's mission. I note in your opening remarks you did address the question of abolishing some of the other acts.

More broadly speaking, I would ask you to address yourself to the question of your mission, how you believe it should be changed, and whether you think substantial parts of it should be removed as part of deregulation.

Mr. SIMPSON. First of all, let me state that I think when you get into the process of reviewing, particularly some of the older agencies, you may find the situation where the agency has perhaps in some program areas outlived its usefulness.

With respect to this agency I think the problems are real problems. I think that the injury data supports that. I think the Congress is absolutely correct.

On the transferred acts I am not suggesting you remove any authority.

I am suggesting you take the identical authority as to product coverage, et cetera, but just have mechanisms for the use of that authority follow the procedures outlined in the CPSA which I think is a better expression of the views of Congress.

In the future, if you take a look at all agencies, and, if, in the regulatory reform deliberations, one were to look toward consolidations, I think it would certainly be rational to consider, that the product kind of authority which we have might well be combined with the product authority in the Bureau of Radiological Health.

As a matter of fact, on television sets, which I understand is the principal activity of BRH, we regulate fire, shock, and other hazards, and they regulate radiation hazard. I think that could be combined. I personally think an error was made at the outset in the injury data collection operation. I believe the poison control centers are presently part of FDA which are gathering injury data. We use these data in the Poison Prevention Act and Hazardous Substances Act.

The Poison Control Center could be managed as part of the same overall injury collection system. Lest one thinks that is bureaucratic, and I have never considered myself a bureaucrat, let me go on.

I think you might well consider combining automobile regulation with the other kinds of products because we do have a variety of overlaps, for instance, in motorcycles. If a motorcycle is a very large vehicle used on the highways it is clearly subject to the jurisdiction of NHTSA. If you take a very small motorcycle and you call it a recreational vehicle it is clearly subject to our jurisdiction.

One is larger and the other smaller, but clearly we are dealing with similar products. You might consider the automotive field.

Let me suggest an area that I think you might want to consider removing from the agency. That is the area where this agency deals with chronic hazards.

Our injury data collection system is geared to measure injuries on a cause and effect, laceration, puncture, death, et cetera.

Yet, we do have the authority under the Hazardous Substances Act to deal with injuries that are of a long-term nature, where the injury only becomes apparent generally through research.

A lot of this is now exposed through OSHA activities and it really is primarily a health problem.

I think the injury data collection system that might guide you in the right direction is probably a statistical one, probably somewhat similar to the center for disease control. It is that kind of area.

I have been concerned that we do not have an adequate funding level to do the job that we should be doing in research on chronic hazards. When you have near-term problems that you know are occurring in the marketplace today I think you must divert your resources and you pull resources from the future when you do this, future research on long-term chronic hazards, complicated animal testing, et cetera.

I think you might well consider combining that kind of research in one of the health agencies such as EPA, HEW, OSHA.

You might consider combining the acute or direct cause and effect products in this agency.

Drugs I think are peculiar enough that I think you would gain very little from synergy, that overused word, from dealing with drugs.

Mr. Moss. I think we are fortunate in that the Commerce Committee has jurisdiction over each of the areas discussed by you. So in the course of oversight the committee can look at the assignment of responsibility within the Department of HEW, assignment to FDA, the Auto Safety Act, its handling by the Department of Transportation and can give careful consideration to the recommendations you are making, reserving judgment until we have heard from all others.

I would like to take this opportunity to clarify one point.

AGENCY INDEPENDENCE

I believe that goes to your page 10 in your statement. You raise the question of the independent nature of the Agency.

Having addressed myself to this on many, many occasions, it was and I believe remains the clear intent that if this is tilted any place from its independently assigned role, it is to Congress, because you are exercising basically the delegation from Congress which it derives from the commerce clause of the Constitution itself.

We do regard you as an arm more of the Congress than of the Executive. We are attempting to create in this new commission a pattern which will undoubtedly move through the recommendations, if I have anything to do about it and I anticipate that I shall, recommendations that the other so-called independent regulatory commissions be removed, even further from identification or possible misinterpretation of their role as being that of an executive function. It is not.

On the point raised by you, the matter of representation of civil and criminal matters, had the act reflected my original desires, that power would have been vested in the Commission.

Matters going to the Supreme Court would fall in a different category. On all other litigation I think the Commission would handle it more effectively itself.

There will undoubtedly be some specific recommendations on strengthening your independence and strengthening you on the other issues.

Mr. SIMPSON. Mr. Chairman, I don't want to give the impression by my statement that I favor one or the other.

Mr. MOSS. I gathered nothing of that nature. You asked for clarification.

Mr. SIMPSON. As a matter of fact, I think that my record in the last 3 years has fairly consistently demonstrated that I agree with your interpretation.

That is my individual personal reading of the act.

I suggest that when we talk about moving things closer to the executive branch, my interpretation is that the independent agencies do fall somewhere in between. I say to you that this agency is the most independent of the independent agencies by statute.

It is tilted closer in the budget provision, the provision that the Chairman of the Agency serves until his full tenure to the legislative branch. But I can point out some problems. That is, that all of your colleagues don't agree with you.

Mr. MOSS. I recognize that.

Mr. SIMPSON. This is not without respect, but I found that many of them have never read this act. I might also say that some of your colleagues disagree with you in the various committees I have dealt with concerning this tilting toward the legislative branch.

Let me talk about one item, the personnel ceiling. The President sets the personnel ceiling. If we had $100 million and only had 890 people we would still be in a hell of a situation. So I suggest in this tilting that if you want to improve the operations of the Agency, you should legislatively pay attention so that it is not only independent but is independent enough and has enough resources to allow it what Dr. Pittle is talking about, the tools to get the job done.

We are not sure whether what we have in our hands is a hammer or saw; we are not sure whether we should be pounding or cutting and much of the problem is that way.

Also, I would suggest that in the tilting process toward the Congress that the Congress should pay particular attention to the accountability function. I don't criticize the Congress because I think budget accounting and oversight accounting are terribly difficult processes.

The agencies will always know more about what they are doing, because they work with it all the time, than you can possibly know because you don't have the time when you are reviewing agencies with this broad scope of yours, for instance.

I suggest that in that tilting process you also build in the mechanisms so that at least the question of accountability doesn't arise, at least it does not arise as often.

For instance, it would seem to me that someone else ought to report to someone else.

Now, I think it was Chairman Engman of the FTC in a public speech who, when he was asked who he was to report to, I believe he said, "God and my conscience."

It is very difficult to report to the U.S. Congress. That is 535 people. That is very difficult. So, I suggest that you need plans so that you can measure performance against plans.

That is an element. I have outlined that. There has been a suggestion that you may want a full-time mechanism, something like a General Accounting Office—you may want to have a regulatory accounting office.

I think perhaps it is important. At least public credibility and confidence would not suffer and perhaps the lack of those may explain why some of the older agencies have drifted to a point where they are accused of being captured by one interest or another. There is no natural constituency when you are in the middle of something.

NEED FOR EFFECTIVE CONGRESSIONAL OVERSIGHT

Mr. Moss. The Congress has failed in my judgment to adequately undertake its role in relating to the independent agencies it has created. It has not done the kind of oversight job that it should.

I believe that we are now creating the mechanism here on the Hill to handle greater budget responsibility and greater independence on the part of the Congress, less reliance upon the Executive, than formerly existed.

I come from a State which for over 30 years has had a legislature with a legislative auditor who participates on behalf of the legislature in every step of the budgetmaking process.

When the executive budget is filed, the budget document of the auditor is filed, and the legislature has then the benefit immediately of the two views.

It depends probably more on the document prepared by its own expert than it does on the one prepared by the Director of the Budget or the State Department of Finance.

Mr. SIMPSON. I am from that same State. Maybe it is a model we should look to.

Mr. Moss. It is the kind of thing we are going to have to move to on the Hill if we are not going to be gobbled up by an ever-growing Executive, and I use that without any partisan overtones because the phenomenon of the Executive always grabbing for more and more is one that I have observed with care for the last 40 years in both parties.

Mr. KUSHNER. May I make a couple of comments germane to the question of our mission. It seems to me that the Commission has an excellent mission, an adequate mission, but that people tend to overlook the fact that it is a four-part mission. Particularly in connection with oversight, perhaps one finds an overemphasis on the reguatory aspects of the Commission.

Our comments here today have already gone in that direction. But two parts of the mission have to do with helping the public to become better informed consumers with respect to safety and to promote research and development that would be useful in this field.

I think that unless oversight begins to pay some attention to these functions and being sure that the Commission has adequate resources to do them, we'll only be directing our efforts toward the 15 percent to 20 percent of the possibly correctable or eliminatable injuries. We will never be able to put sufficient resources in to deal with problems such as chronic hazards, particularly those that involve the interface between consumer products and the environment. These are long-term studies. As long as the emphasis in oversight will be on "How are

you guys doing as regulators?" and funds will always be short, I suspect that those parts of our mission will continually be overlooked.

Since there were comments on the question of accountability, in my own mind, I strongly believe that to the extent that independent agencies do have a tilt it is toward the Congress, since they do perform a legislativelike function.

Nevertheless, Congress is not a particularly efficient mechanism for assuring accountability and it is precisely because of that, that I think it has been necessary in the past, and desirable in the future, to continue to think in terms of the collegial body approach to managing independent regulatory agencies.

When one has agencies with the independence of the Consumer Product Safety Commission plus the independence and tenure of its Commissioners—the individual Commissioners as well as the Chairman—then it seems to me it is essential that the overall policy direction of the agency, the major thrust of its program, particularly those specific decisions that put restrictions on businessmen, that limit the choice of consumers, that impose obligations on everybody in the distribution chain, and that are in effect, law, should be made on the basis of the judgments of a group of individuals whose combined consideration of the issue is likely to be such that the public can have confidence in the quality of the decisions.

These decisions are just too important to be left to one person regardless of how good that person is.

Mr. BROWN. As we are going along there are a lot of issues that are coming up that I hope we will be able to come back to.

The education function of the Commission is one. I was particularly interested in your remarks, Chairman Simpson, about chronic and long-term hazards and the role of the Commission in that area. I hope that if we don't get back to that today, you may feel free to expand your remarks for the record and the other Commissioners also.

It will be particularly useful to the subcommittee.

COST-BENEFIT ANALYSIS OF PRODUCT SAFETY REGULATION

A number of critics of Government regulation have urged that there be cost-benefit or risk-benefit analysis of Government regulation. This often seems to be particularly a problem in the health and safety area.

Could you address yourself to your problems in that area, particularly in regard to the usefulness of that kind of analysis to the product safety regulation you are engaged in.

Mr. SIMPSON. I think we have to make sure we don't fall into a trap from the use of buzz words like cost-benefit analysis or risk-benefits analysis or risk-necessary indexes.

To the extent we are really talking about that, we should know the effects of our activities; that is, the economic effects on consumers, producers, et cetera—the effects on competition, the effects on utility of the product, effect on availability of choice, et cetera.

To the extent that we are talking about the knowledge of the effects of what we are doing, then I agree that every agency should be required to do that. I believe that this agency is, in fact, required to

do that because in the Consumer Product Safety Act the findings that we must make at least with respect to the regulations, the standards issued, while not described as risk-benefit or cost-benefit, in fact are that.

We are required to make economic findings on the cost to consumers, cost to manufacturers and producers, effect on competition, effect on utility, and as a matter of fact, another finding as to whether or not we considered other ways of getting the job done without a standard.

I think another feature of the section 9 findings is good in that if we fail to make one of those findings or fail to adequately make one of those findings, then the entire technical regulation can be challenged on the basis of economics. I think that is a plus.

Now, when you say that, if an agency is going to do that with any kind of precision that will withstand a credible peer review, then you must either have data bases or be willing to fund the collection of data or have agreed upon predictive techniques that will allow the agency to make the findings.

So that, when an agency first starts, I don't think you can do it. We couldn't have done it. We have been working toward that in measuring the level of compliance such as you saw; in measuring rational priority settings such as you saw; in trying to predict the effect of the regulation such as you saw. We are moving in that direction.

But even right today, while all of our techniques, I think, with the available information can withstand peer review, certainly they can be picked apart.

I, for one, have not been willing and have not wanted to go up and use emotional arguments of pain, suffering, et cetera, in the budget process because I don't want to use statistics unless I can stand behind them.

It is easy to ask questions. We have had those questions asked by the budget process on how many injuries we are going to prevent, how many injuries associated with a consumer product, how many caused by imports, compared to domestic manufacture.

If you want the answer to that question, I am not sure I can give it to you. I am not sure it is an important question. But it is easy to ask questions that require an analysis of data which we didn't have. We are weak, for example, in economics on a data basis. I think we can probably as well as anybody in Washington now predict those effects. The Consumer Product Safety Act requires us to do that.

The transferred acts do not require us to do that.

If you believe that is a desirable feature, then you will get that feature if you abolish the transferred acts and bring the regulation and product coverage under the CPSA.

As a matter of fact, even though we are not required to do so by the transferred acts, we impose the obligation on ourselves to do so because it makes good sense. I wholly agree with the need. Otherwise, I am afraid you really get into trouble.

Mrs. Franklin. I am one who talks quite frequently in my speeches about the need for better cost-benefit analysis. The reason I feel that way is this:

Let us dismiss, on the one hand, all the jargon and whatever else goes with the cost benefit and so on. The real value in this kind of discipline is not in all the statistics and ratios that can be spun out—a lot of which are quite meaningless, frankly—but the real value is the underlying framework it provides for decisionmaking. That is what helps me as a decisionmaker.

What this kind of analysis does is force the asking of some very key questions that any regulator in the health and safety area should be asking.

You ask what the benefits will be. I know it is hard to quantify; it is impossible to quantify what a human life or a cut arm are worth. Those are really tough questions. But when you are asking them, regardless almost of how precise the answers are, you are imposing that discipline.

The same is true on the other side of the equation. What is a certain regulation going to cost an industry to retool or redesign or to change technology, and what costs are going to be passed along to the consumer? How much does the consumer really want to pay for this benefit?

That is the value of cost-benefit analysis. It really gives us a framework in which to make a decision.

The final decision, as I see it, is always going to be a matter of judgment, my judgment and the judgment of the rest of my colleagues. But it gives me a much better and hopefully more reasoned basis on which to make my judgment if I have at least attempted to answer these questions.

That, to me, is the value of cost-benefit analysis.

Forget the ratios.

Mr. SIMPSON. Since I heartily endorse the concept, maybe I should also point out what I believe might be a possible trap that you might get yourself into if you extend such a requirement to other agencies.

Unless you are willing to extend the requirement in such a way as to not question the precision of the estimates too much, you must apply something like a reasonable man test. If you don't do that, then you try to suggest precision where it does not exist either because of inadequate data bases, inadequate predictive techniques, or inadequate ways of deciding the cost of injury or life.

If you intend to apply precision, you are going to invite regulatory delay because these are always very difficult decisions that are being made.

The economic impacts are very difficult. The costs of injuries are difficult. You can drift into a situation of paralysis by analysis. You can always get into a situation where you can gather more information. It will cause delay if the implied precision is more than what is possible.

I think, for instance, that if you look around Washington you might find that the NEPA requirement, the National Environmental Policy Act, may well be causing some regulatory delays because it is difficult to know the effects on the environment.

We were in a situation this week at an executive session where we were required by the act to state our standards in terms of performance language. That is desirable because it does not lock in a design. It provides maximum opportunity for innovation. But when you write

standard and performance language that means you don't know how the manufacturer is going to meet that performance requirement, then it is almost impossible to determine the environmental impact in advance which you are required to do by NEPA.

In that kind of situation you must make judgment decisions.

I would urge that if you extend the requirement don't require precision that is unreasonable. In fact, I urge you to firmly state a reasonable man test based on best available data or something.

BURDEN OF GOVERNMENT REGULATION ON BUSINESS

Mr. BROWN. One of the criticisms of Government regulation is that regulation imposes a heavy burden on business. Your agency has not been without its share of criticism in that department.

One of the requirements of your act is that your regulatory activities were intended to be a coordinated effort between both consumers and businesses. What kind of things have you been doing to lessen burden on business, particularly small businesses and new entrepreneurs, or do you in fact think that your regulatory activity imposes a substantial burden on business.

Mr. SIMPSON. I think that the regulatory activities of the agency impose a change generally. A change is perceived by many people as a burden. We never like to concede that something we were doing in the past was not adequate.

I think that to the extent that we are talking about a cost burden, there must be an offseting benefit. To the extent that a cost increase is necessary, to the extent that you are providing value added through decreased risk, then I think the cost burden is overstated and I think the economists are equating costs, are equating added dollars with increased cost. And yet burdensome it is not.

There is benefit on the other side of the ledger. If you are talking about $1 billion a year of cost, and you can reduce the expenditure of so many dollars, I think it is in the right balance.

The effect on small businesses always is a very difficult one. If we get into the levels of compliance we are finding that communications is a problem, the ability for small businesses to accommodate to regulation, where the difficulty is solely associated with size, available capital.

If you have an industry that is subject to regulation, a very large company or very small company, oftentimes purely as a function of size it is more adverse to a small company than to a large one to require testing facilities, for instance.

I previously stated that I believe the Federal Government to be consistent in its treatment of small businesses should require or should have available an economic assistance program in the form of loans or something to allow small businesses to accommodate to a Federal regulation where the inconvenience or the cost is disproportional because of size.

I think there is an act to deal with something like that. I think it should be more publicized and more money made available.

We are required to consider effect on competition. In the mattress standard most of the companies are small businesses and we didn't know one of the consequences of the product testing on them.

The large companies, which were multiple plants, could pool their prototype testing. We amended that standard to allow small companies, different ownerships, to go together and pool their testing to the extent that the product had the same inflammability characteristics.

You do try to take it into account. There is always a problem of communication with small businessmen. There is always a problem of accommodation. The relative impact of $5,000 on a company with a $100,000 sales is a lot greater than for a $1 billion corporation.

I think it is inconsistent and I don't think you can allow the smaller companies to produce products to a lesser standard then the larger companies.

RELATIONSHIP BETWEEN CPSC AND DEPARTMENT OF JUSTICE

Mr. BROWN. In your opening statement this morning and in earlier remarks Chairman Moss made, the Justice Department's role in litigation involving your agency was discussed.

How satisfactory has your relationship been with the Justice Department both in civil and criminal matters?

Mr. SIMPSON. I don't want to get into a finger-pointing contest with the Justice Department but let me point out that the reason I believe that the agency should file its own cases in criminal action is because with our low resource level we also lack the motivation that would come about by a criminal penalty.

If you talk to a businessman, corporations pay penalties but people who work for corporations pay criminal penalties.

It is people who go to jail.

In my personal opinion, I do not believe, I would not agree with the societal decision made by the Congress that these particular kinds of violation should be sanctioned by a criminal felony. However, my job is not to question that, my job is to try to implement the act.

I have absolutely no question but what that—the possibility of going to jail—provides a great deal of motivation. If you are going to get that motivation somewhere along the line you can do the inspection, you can prepare the case, you can review the statute but somewhere along the line you have to file the case.

When we get the criminal cases and we go to the Justice Department our level of action or the bigness of the case I suspect is relatively small compared to most of the cases that the Justice Department handles.

Let me take some for instances of retailers.

Suppose we had maybe 1 million retail establishments selling toys against a toy regulation. When we make an inspection and find a violation let us suppose that we find 1,000 units of toys that sell for $2 apiece. That is $2,000 worth of goods involved if we seize it and we can demonstrate it meets the test of willful, knowing, for a criminal violation.

In equity to that individual in that case I think it is inequitable to apply a criminal penalty. The reason why I am willing to do it is because that case represents perhaps, if it is statistically and randomly selected, perhaps 1,000 similar instances.

So if you believe in statistics, that 1,000 units might be 1 million units involved in 1,000 different firms. So, our concept of motivational

compliance is to be harsh, be inequitable in using the criminal penalty and publicize the hell out of it.

Mr. Brown. Are they filing the cases?

Mr. Simpson. The Justice Department has not been filing the cases. I am not sure that they either recognize or subscribe to what is a very difficult concept of motivational compliance. Generally you look at a case in equity and in equity if that is the way you are looking at it I would not file some of them either.

But all of these cases we send over, we will give you the dates if you would like, the number of cases, are all screened and most of them in fact are rejected by this Commission. Every case goes through a screening process through these five people.

We close a lot of cases. We work for consent orders in a lot of cases. We close a lot of cases.

So, after the selected screening it goes through—I am told and I will have to check the data but this is a note—in the last 19 months Justice has declined 26 of 39 cases that we sent over, criminal cases.

Mr. Moss. Will you note for the record the summary of the referred cases and the disposition of them.

Mr. Simpson. It will not be a description of the individual cases. It is a summary. We are talking about the privacy of the individual through discussion of the case if the case is not filed. But the summary data we will submit.

[Data referred to appears on p. 67.]

Mr. Moss. I think it might be wise now, it is 12:10, to break until 2 p.m.

We will not sit beyond 4 p.m., for your planning.

The subcommittee will stand adjourned until 2 p.m.

[Whereupon, at 12:10 the subcommittee adjourned to reconvene at 2:00 p.m. the same day.]

[Subcommittee did not meet at 2 p.m. and stands subject to call of the Chair.]

REGULATORY REFORM—CONSUMER PRODUCT SAFETY COMMISSION

THURSDAY, FEBRUARY 19, 1976

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS,
COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE,
Washington, D.C.

The subcommittee met at 2:30 p.m., pursuant to notice, in room 2322, Rayburn House Office Building, Hon. Anthony Toby Moffett, presiding (Hon. John E. Moss, Chairman).

Mr. MOFFETT. The committee will come to order.

This hearing represents a continuation of the subcommittee's study of regulatory reform. We have been analyzing the Consumer Product Safety Commission and will continue with that today.

As I recall, the witnesses before us, Chairman Simpson and the other Commissioners, have had an opportunity to make opening statements, so we will proceed to ask questions at this time.

I will attempt to set the stage for the other questions and begin by asking you, Mr. Simpson, a question about the delay in standards development.

The agency's plan, which you refer to on page 25 of your opening statement, proposes that approximately 100 product safety standards by fiscal year 1982 would eliminate about 75 percent of the correctable risk from unsafe consumer products. In almost 3 years the Commission has promulgated just one standard for a relatively minor hazard under the Consumer Product Safety Act. As I understand it, there are only seven more standards in the development stage.

What possibility is there, really and truly, of achieving 100 safety standards by the year 1982?

FURTHER TESTIMONY OF HON. RICHARD O. SIMPSON, CHAIRMAN, U.S. CONSUMER PRODUCT SAFETY COMMISSION, ACCOMPANIED BY BARBARA H. FRANKLIN, COMMISSIONER; LAWRENCE M. KUSHNER, COMMISSIONER; R. DAVID PITTLE, COMMISSIONER; MICHAEL A. BROWN, GENERAL COUNSEL; AND STANLEY R. PARENT, EXECUTIVE DIRECTOR

Mr. SIMPSON. I think, as the plan you referenced points out, part of it will be contingent on funding and resource levels. The levels outlined through 1982 in that same plan are those that we feel are adequate and would be necessary. There are some assumptions that go along with the plan. Those assumptions are that the agency will work on a priority basis, et cetera. I won't repeat them all.

Basically the gist of the question is, we have only produced 1 standard so why should there be assurance we can produce 100 by 1982?

I am sure you are aware that I did outline, in the charts and in the statements, that the agency has five statutes that we must deal with. As a matter of fact, under the enabling statute the Consumer Product Safety Act, the other four statutes are given preference.

In other words, we must look to those acts first under section 30(d), and we must regulate under those statutes unless we can make a finding that we lack sufficient authority in those acts.

So the Commission has been active under the other statutes. We have bicycle regulations, fireworks regulations, baby crib regulations, and other standards moving into effect under those statutes. We also count those among the 100 standards.

Also, I am sure you recognize when you first start in a new area of authority it takes time to get the procedures established and the data started so you can begin writing standards.

The first standard under the CPSA is in a final state, that is the swimming pool slide standard; the architectural glass standard is essentially finished, the development of it. The technical work on the book match standard has essentially been completed. We are now working on a resolution of what appears to be an apparent conflict between the language of the Consumer Product Safety Act and the National Environmental Policy Act, NEPA. The apparent conflict is raised because of the mandate in the Consumer Product Safety Act to write standards in terms of performance language so you will not stifle innovation, et cetera.

One of the requirements in the book match standard is a limit on the burn length or burn time of the stem. This is considered to be a child safety feature. Most of the evidence indicates the most practical way to comply with that performance language would be through the use of chemicals.

So we have a performance standard that says use any chemical you want to meet this burn length requirement but NEPA says you must evaluate the environmental consequences of using all chemicals. We think we will be able to resolve that by writing a modified performance standard which eliminates the use of some chemical compounds and fire retardants.

PRESIDENT'S BUDGET RECOMMENDATIONS

Mr. MOFFETT. You mentioned funding as being a key factor. Is it true the President's recommendation is actually a decrease?

Mr. SIMPSON. It depends on how one measures dollars.

Mr. MOFFETT. How do you measure them?

Mr. SIMPSON. It is a decrease in my terms. In practical spendable dollars it represents a decrease. The President recommended $37 million for the agency which is the same as he recommended for 1975, 1976, and 1977. As a matter of fact, in a letter from the Office of Management and Budget they recommended that same level of dollars out to 1981.

Whether we want to ignore it or not, there have been some mandatory wage increases, the cost of travel has gone up, the cost of rents has gone up and we have a thing called inflation. So the net effect of that is a decrease, yes.

Mr. MOFFETT. You asked for what, 50 originally; is that what you wanted?

Mr. SIMPSON. In the 6-year plan as outlined in the 1977 budget estimate, it was $54.8 million.

Mr. MOFFETT. The President's recommendation is 37?

Mr. SIMPSON. Yes.

Mr. MOFFETT. It isn't close?

Mr. SIMPSON. No. The President's number represents an actual dollar decrease. In the current fiscal year we have an appropriation of $39.6 million.

Mr. MOFFETT. Can you really make the statement "regulation doesn't work" unless the regulatory process has been adequately funded in the first place? Since your agency hasn't been adequately funded, isn't it premature to say that "CPSC regulation doesn't work."

Mr. SIMPSON. I think certainly if you don't have adequate funding it is premature. I think there is no question about it, the level of funding determines an awful lot of what the agency does.

We have told the Appropriations Committee and this committee, when you, meaning Congress, chartered the agency you gave us authority over an estimated 10,000 products. You said manufacturers, distributors, retailers, and importers are covered under that jurisdiction. We have the mandate to make sure we have compliance with the regulations.

With the level of resources that we have just for inspection purposes, as I indicated in the first part of this oversight hearing in my testimony, we estimate that we can make a return visit to one of those facilities in the United States, not counting all importers, who are also covered, we can make a return visit about every century. That is about once every hundred years with the current level of inspection resources.

So, words like level of resources for inspection purposes being inadequate, negative or whatever you say, they won't work. We are not asking for a level of resources to increase the frequency of inspection to a rate of once a year. That would be thousands upon thousands of people, but we are asking for other legislative changes which will allow us to leverage those resources. We have already taken a lot of steps to try to leverage those resources.

We have utilized and trained several thousand volunteers. We call them consumer deputies. Some have critically termed them consumer vigilantes, but they are citizens who have volunteered to survey retail establishments at no cost to us. They pay their own travel and everything else. It has forced us into a healthy mode of trying to leverage and get the job done.

COMMISSION'S LITIGATION AUTHORITY

One of the things we have asked for again is the right to take our cases into court. I believe the congressional theory was that the company, whatever the company may be, manufacturer, distributor, retailer, importer, has the primary responsibility to test its product. It has the primary obligation to insure compliance with the law.

The theory is when we find someone who is not, we can punish him and then by example it will cause others to fall into line.

Mr. MOFFETT. Is it safe to say you feel the Department of Justice does not do as good a job as it could, or anywhere near as good a job as it could?

Mr. SIMPSON. I hate to be in the position of evaluating the Department of Justice. They have not taken the cases I though they should take and filed them on behalf of this agency. I recognize they are putting our cases in a priority with all of the rest of the Government's cases. If I were in the Department of Justice and I solely looked at that, from their point of view, I might come out the same way.

But when I recognize that every inspection that we make is representative of several thousand firms that we won't get to, where we find perhaps a violation of let's say a toy regulation and the number of units involved is 1,000 units and maybe they cost $2 apiece, so the total violation is $2,000, then if you recognize that that statistically represents perhaps 1,000 firms you know you will never get to, that looks like $2 million to us and we have had a very difficult time communicating that philosophy to the Justice Department.

I think if we were to file our own cases we would not be filing very many cases. We would in fact be seeking a penalty which most people would agree and we would agree is an overkill looking at the facts of that individual case.

But the reason we would do that is because it would represent so many firms that we will never get to and, I believe it is in the public interest to do so.

Mr. MOFFETT. Do you recognize the difference in how the Justice Department is performing?

Mr. SIMPSON. Yes; we recognize the difference.

Mr. MOFFETT. How much time is spent in duplication, with the time of the Justice Department?

Mr. SIMPSON. It may represent a net decrease in the amount of time we spend, in my opinion. What we do now, as do most agencies in the Government, we do all the legal brief work, the case preparation and then we educate someone in the Department of Justice, bring him up on the facts of the case, et cetera, and then he stands up in court. If we were to go into court, we would not have the burden of educating someone and you would be trading the educational time and cost against the time to stand up in court, and in my best guess it will be perhaps the same or even less effort on our part.

Mr. MOFFETT. I will yield to counsel for some questions.

Before I do, I want to comment on something you mentioned about how you are criticized for using volunteers.

Some of the things that your agency has done I would suggest they could do better and I want to learn more about the agency and I think the other members do, too, but as far as our attempt to involve citizens, I think it is a refreshing approach that many of us in Government think you should do more of.

The Chair recognizes counsel.

JUSTICE DEPARTMENT ACTION ON CRIMINAL REFERRALS

Mr. BROWN. Thank you, Mr. Chairman.

Mr. Simpson, when we recessed the hearing at the last session, you had just agreed to submit for the record some statistics from the Com-

mission on the record you have with the Justice Department in terms of criminal referrals and the cases prosecuted.

I wonder if you could in addition submit for the record the statistics that show the number of cases that have been recommended to the Commission either by your staff in Washington or by the field and the Commission's action on those.

Mr. SIMPSON. Yes; I will because all of those, as I mentioned, every case before it goes to the Justice Department must pass the screening of the five Commissioners. They do, therefore, go through a screening process.

We will be glad to give you the figures on case referrals from the field.

[The following information was received for the record:]

CRIMINAL PROSECUTION RECOMMENDATIONS BY SOURCE OF RECOMMENDATION AND ACT FOR CALENDAR YEARS 1973–76

	1973 [1] (from May 13)	1974	1975	1976 (to Feb. 20)	Total
CPSA:					
AO prosecution recommendation		0	0	0	0
BCM prosecution recommendation	0	0	0	0	0
Commission referrals to Department of Justice (DOJ)	0	0	0	0	0
Filing	0	0	0	0	0
Declined	0	0	0	0	0
Pending	0	0	0	0	0
FFA:					
AO prosecution recommendation		4	[2] 28	1	33
BCM prosecution recommendation	0	1	5	1	7
Commission referrals to Department of Justice	0	0	0	3	3
Filing	0	0	0	0	0
Declined	0	0	0	0	0
Pending	0	0	0	3	3
HSA:					
AO prosecution recommendation		35	16	0	51
BCM prosecution recommendation	38	26	16	[3]	80
Commission referrals to Department of Justice	0	12	25	0	37
Filing	0	4	5	0	9
Declined	0	8	15	0	23
Pending	0	0	5	0	5
PPPA: [4]					
AO prosecution recommendation		8	3	0	11
BCM prosecution recommendation	0	4	3	[3]	7
Commission referrals to Department of Justice	0	1	6	0	7
Filing	0	0	1	0	1
Declined	0	1	4	0	5
Pending	0	0	1	0	1

[1] Commission records from May 14, 1973 to April 1, 1974 did not record the area office prosecution recommendations.

[2] During early 1975, the area offices were considering "prosecution" synonomously with "legal actions". Generally the case evidence would not support criminal action under FFA. Area office criminal action recommendations have predictably declined with improved knowledge of FFA.

[3] With delegation of HSA and PPPA case development responsibility to the area office, prior review of area office recommendation by the Bureau of Compliance has been eliminated.

[4] Any cases which included both PPPA and HSA violations were recorded only once—under HSA.

Mr. BROWN. You have indicated that your feeling is that the Justice Department simply views your cases as small cases and really low priority in its hierarchy of prosecution. That does not really seem to be what the Justice Department is saying. A number of times when

it has declined to prosecute cases you have referred, it has been highly critical of your agency, and yet you nevertheless have asked for criminal prosecutorial authority.

Do you really think your Agency should be handling that in view of the sharp criticism that the Government's chief criminal prosecutor has subjected you to?

Mr. SIMPSON. Let me give you a short comment of mine and then let our General Counsel expand on that.

My basic answer is that I think a lot of the criticism that is contained in the letters from the Justice Department back to us is seated probably in a desire for them to retain the central control of prosecutions. I think some of the arguments have little merit.

One of the arguments they make is timeliness. We have been working on this and discussed last time the efforts we are going through to get the cases submitted in a more timely fashion. As a matter of fact, in a lot of the cases which Justice rejected, they had filed other cases where the average length of time was about the same. Of the cases they filed, we have generally won them: there have been guilty pleas.

Mr. BROWN. Even if they have filed cases after a long period, in a number of cases where you were criticized it was as much as a year or longer from the time the alleged criminal violation occurred until the time the case was referred to Justice. Don't you think that is probably too long?

Mr. SIMPSON. I do think it is too long. As a matter of fact, in our compliance effort we are now in the position to delegate case preparation to the field, and our average time is 3 months. Our target time is to have it less than 3 months. Before you can do that, when you have a new agency, recognize first you must have consistency. That takes training.

We are a new agency. We centralized and did not delegate authority to the field because we didn't have the consistency: we would have been on absolute witch hunts. We had regulations that were inconsistent. We had to have consistent regulations. We have been working on that, and I think we are probably our own worst critics in that area.

Nevertheless, I don't think the time has been unusual in the cases that we have sent over. I think the principal argument is that we submit what might be considered de minimus cases, small cases. To us, although a case is small, it represents collectively a large case. If it is small to them, let us file them then, let us file the cases. We are not going to file a great number of cases. I think the total number that has passed our screening and been sent over was 30 some cases. I don't think that is a great number of cases. Let us try it if that is the problem, and we will see. Maybe it won't work.

There are some people who believe that the motivation of a criminal penalty is not a real one anyhow, but we need to first test that.

Let me ask General Counsel to comment.

Mr. MICHAEL BROWN. One of the comments we have when you talk of criminal prosecution is the Federal Hazardous Substances Act has no civil enfrocement penalty. There is no other way.

Mr. BROWN. But isn't there a much easier standard of proof in that act? It is almost a civil type standard of proof, isn't it?

Mr. MICHAEL BROWN. That is one of the points. We have no civil means of enforcing the Hazardous Substances Act. Criminally, the Congress gave us no requirement of showing willfulness. However, when we deal with U.S. attorneys and deal with the Consumer Affairs Section of the Department of Justice, they are extremely reluctant to go forward, regardless of what standard the Congress imposed. They are very reluctant to go forward in a criminal case unless you can establish knowledge and willfulness.

If you look at the correspondence and what the Justice Department is talking about, what the attorneys call on us to do, they call on us to reinspect on these firms and show knowledge and willfulness and that the conduct has continued. The penalty for this is 90 days or a $500 fine. These are not attractive penalties to the U.S. attorneys. They don't feel it is worth their time. So we get in the box of having no civil penalties and a standard that the criminal prosecutors don't like to work with. We find we are not getting the action on these cases, but we find some U.S. attorneys will file. This is the problem, we are enforcing a national law through U.S. attorneys.

If you live in one district, we can get you. If you live in another, we can't. If we were doing this deliberately, this committee would probably be asking us why we were doing it.

Mr. MOFFETT. The Chair recognizes Mr. Collins.

DISTRIBUTION OF COMMISSION PERSONNEL AND FACILITIES

Mr. COLLINS. As I understand it, we will have the 5-minute rule.

I want to tell you I appreciated the opportunity to visit with you before the hearing started, and you have a wide range of backgrounds among the members of the Commission.

In our hearing today, we have a broad spectrum among the Congressmen sitting in. I know some of them would advocate that you be much more active.

The gentleman from Louisiana and myself are wondering perhaps how far we should go with the provision. So it puts you in the middle as to where you should go.

What is the size of this manpower?

Mr. SIMPSON. 890 people.

Mr. COLLINS. How many in Washington?

Mr. SIMPSON. About 60 percent.

Mr. COLLINS. Why is that?

Mr. SIMPSON. It is because of the task you gave us. We have a responsibility to maintain a national injury information clearinghouse. That is best done out of Washington, and we have gathered data from hospitals by computer. We have an administrative function, we cover the technical disciplines. If you look at the products subject to our jurisdiction, we deal with the engineering sciences and physical sciences, there are chemists, et cetera.

In the field offices, the main functions relate to those things associated with inspection, that is, we have again the assignment to insure compliance with the regulations and about 70 percent, 70 to 75 percent of the time of those people in the field, is spent in inspecting facilities. The balance of the time is injury investigation. That is to find out what is happening with products which is preliminary to determine what you should do and how to do it.

Mr. COLLINS. You could just as well have your central office in New York or Boston?

Mr. SIMPSON. Yes; the statute says a principal office established some place. If I stayed on I would move it to San Francisco.

Mr. COLLINS. Which would be better than Washington. I think we have too much bureaucracy in the system here. I wish we could establish in different communities.

Mr. SIMPSON. I am a little facetious. The authority is to establish the office anywhere in the country, but I do believe headquarters should be in Washington, D.C.

Mr. COLLINS. I think we tend to get a little overly bureaucratic as we sit here dealing with bureaucrats.

REPORTING REQUIREMENTS

Mr. SIMPSON. That may be true.

Mr. COLLINS. How many total reports do you have working right now, how many pages are in those reports, and how often do you review your reports?

Mr. SIMPSON. Reports of what?

Mr. COLLINS. My goodness, I hope you are so good you can ask of what. I ran into a company in my hometown with 450 reports they have to file with Government agencies. I wondered if you were one of the agencies requiring reports from businesses?

Mr. SIMPSON. Reports to us?

Mr. COLLINS. You or anybody else. Are you an agency that does not require reports?

Mr. SIMPSON. No; we require reports because Congress laid the requirements on and we administer the act. One of the required reports applies to all the manufacturers, retailers, distributors, and importers in the United States subject to our jurisdiction, that is conservatively probably 2 million firms. Those companies must report to us under section 15 of the Consumer Product Safety Act. They must report to us if they have knowledge of one of their products that either fails to meet an applicable standard or has a defect that could create a substantial product hazard, they must tell us immediately. They must tell on themselves.

Mr. COLLINS. You put the burden on the company?

Mr. SIMPSON. You did; Congress did.

Mr. COLLINS. Could I have a list? Could we ask unanimous consent that we could have this inserted in the record? Are there several of these reports?

Mr. SIMPSON. We don't ask companies to report to us annually, no.

Mr. COLLINS. You have the one report; it is the responsibility of the company.

Mr. SIMPSON. It is not routine, we have some especially required but no routine annual report of anything, other than the continued reporting requirements in the enabling statute, that is defect reporting. Then we have on request, for instance, we have subpenaed data, injury data, for instance, in television sets.

Mr. COLLINS. See if I am right on this. There is no annual report, no quarterly report, no monthly report, but one report expected of any industry in America, they have the burden of telling you if there is something faulty or accident prone?

Mr. SIMPSON. I believe that is correct.

Mr. COLLINS. It is their responsibility.

Mr. SIMPSON. The general responsibility is on the affected company that is covered by the regulation to test and to know the status of his products and then to certify ——

Mr. COLLINS. Suppose they do not notify you and yet you heard they made some kind of equipment you use on the lawn for clipping or something, it was a dangerous item, but they never notified you. What happens then?

Mr. SIMPSON. We are back under section 15. That is the general reporting requirement the Congress imposed, the requirement on the company is to report immediately to us when they have knowledge that reasonably supports the conclusion that the defect could be a substantial product hazard.

Now, that is more than an isolated instance, but a reasonable man test applies. If the company has that knowledge and fails to report to us, they can trigger fairly heavy penalties under the law.

Mr. COLLINS. Criminal penalties?

Mr. SIMPSON. No; civil and criminal.

Mr. COLLINS. You have not invoked any yet?

Mr. SIMPSON. No; not under that reporting provision. We have had a number of cases, though.

Mr. PITTLE. I would like to point out in the 2½ years we have been in business, of all those firms we have received only 350 of these reports. It is not the hundreds of thousands of reports you may have heard about.

Mr. MOFFETT. The Chair recognizes the gentleman from New Jersey, Mr. Maguire.

"OFFEROR" PROCESS

Mr. MAGUIRE. Thank you, Mr. Chairman.

Chairman Simpson, in the offeror process, does the offeror have a stronger influence on the standard setting process than other participants?

Mr. SIMPSON. In my judgment, yes, but it varies a little from offeror to offeror. It depends on how they manage the process and how they make decisions. Some make decisions on, let's say, a provision by majority vote. So if the offeror is simply the manager, then the participants control that. In most of them the offeror has the authority under ours to resolve disputes, resolve differences and present to us his recommended standard but we also require him to submit all minority views, all arguments and how he resolved those. As a practical matter, in most cases if he wishes to exercise it, he has quite a lot of influence.

Mr. MAGUIRE. But that varies depending on the offeror and the committee?

Mr. SIMPSON. Yes, and how they conduct themselves.

Mr. MAGUIRE. Do you issue any guidelines as to which of those various models may be pursued in the actual operation of that offeror and the committee?

Mr. SIMPSON. We have not issued guidelines per se at the outset. We purposely did not issue them because this offeror provision is a new one and we felt somewhat experimental, so we allowed the offeror

to put forward in his proposal how he proposed to go about it and we knew in advance how they proposed to move it forward and there have been several variations of that.

Mr. MAGUIRE. Do you know in advance what the composition of the committee will be?

Mr. SIMPSON. Yes.

Mr. MAGUIRE. You do not grant approval for the offeror to proceed until you know the makeup of the committee?

Mr. SIMPSON. We do not in all cases know the individuals' names, but we know the organizations they represent. We do in all cases know that.

Mr. MAGUIRE. What standard do you apply at that point as to the presence of consumers in that committee?

Mr. SIMPSON. We have always insisted that consumers be represented on all the committees, and I think it has been one-third as a minimum on all committees. It has been a part of all the offers we accepted, it is a contractual thing.

Mr. MAGUIRE. By and large in general you would say the offeror has more influence than, say, other members of the committee?

Mr. SIMPSON. Sometimes the offeror is a consumer organization. The Underwriters Laboratories is the current offeror on the television standard but does not vote in the process. They use the majority rule. In fact, UL, as a matter of fact, on one of the provisions put in a dissenting opinion on one of the provisions, an organizational dissenting opinion.

FUNDING OF CONSUMER PARTICIPANTS IN OFFEROR PROCESS

Mr. MAGUIRE. Let's pursue this Consumers Union thing for a moment. I have read a letter which indicates that they have very serious questions in their minds as to whether or not they will ever be able to do this again, which raises a number of questions about financing adequacy, about whether or not the process is working as intended, whether you think the process is working as it was intended.[1] Commissioner Pittle has some comments on this. I wonder if we could talk about that for a minute.

Mr. SIMPSON. I personally don't think it is working very well, and I think section 7 needs to be amended in several ways to retain what I believe to be the key feature, which is mandatory public participation, mandatory and meaningful public participation and yet still allow the managers of the process to move forward fairly smoothly.

I have outlined those amendments and agreed to send them to Congressman Moss. I think they have probably already been transmitted in writing. So I have put my views on the record in the previous hearing. I would be glad to do it again, but maybe it would be more fair to let some of the other Commissioners give you their views.

Mr. MAGUIRE. Commissioner Pittle.

Mr. PITTLE. I also submitted a statement in the previous hearing.

Mr. MAGUIRE. I read that and wondered if you could comment more specifically on what would be financial adequacy.

Mr. PITTLE. In terms of dollars, if we retain section 7 as written, I think this agency needs a lot more dollars to support nonindustry groups to act as offerors. As I indicated previously ASTM, the Ameri-

[1] The Consumers Union letter is reprinted in Appendix G, p. 341.

can Society for Testing Materials, has stated if they ever get involved again they want every penny paid by the Government. Section 7 has a requirement that all segments of the public be allowed to participate in developing all aspects of the standards. I have to agree with Chairman Simpson that we have to retain the participation of the various segments of the public, particularly the consumer side to analyze and develop the standard.

I personally have come to the conclusion after four or five of these proceedings that probably the best person to manage this would probably be the Consumer Product Safety Commission itself. I think the Commission can move a standard along more rapidly than outside offerors and yet still retain the important benefit of public participation.

Mr. MAGUIRE. Dispense with the offeror process?

Mr. PITTLE. Not exactly. The change I would advocate is that instead of having an outside group be the manager of the process, the Commission should act as the manager of the process. However, the Commission should continue to be required to have all interests of the public adequately represented around the table to write the standard.

Mr. SIMPSON. I think that is essentially my position, too.

Mr. MAGUIRE. Does that solve the financial problem in any way?

Mr. SIMPSON. No, but I think it lays the burden back on the agency who will have to fund it anyhow and you still have the problem of funding participation. We have in fact funded participation in terms of travel and expenses, and there is still an open question whether we should fund salaries of participants.

Mr. MAGUIRE. How do you decide what kind of payment is justified, who determines that?

Mr. SIMPSON. The Commissioners by a majority vote.

Mr. MAGUIRE. In each case?

Mr. SIMPSON. Yes.

Mr. MAGUIRE. I picked up the notion from a letter from the National Consumers League that you are talking about a $30,000 figure as sort of the standard or beginning point for most proceedings.[1]

Mr. SIMPSON. It is too early to tell that, the original going in for Consumers Union was close to $100,000. We granted an extension in addition to almost $100,000. It can vary greatly.

Mr. MAGUIRE. I have additional questions and will be glad to return.

Mr. MOFFETT. The gentleman's time has expired.

Commissioner Franklin or Commissioner Kushner, did you want to respond to that question?

Mr. KUSHNER. I want to make sure the record reflected a view different than those presented by Chairman Simpson and Commissioner Pittle.

I think one must separate the question of whether or not financial support for offerors under the present circumstances is satisfactory from the fundamental question of whether or not the offeror process is basically a sound process. It is my strong opinion that the record of achievements so far under the offeror process is substantial.

I don't see the need for consideration of fundamental change in the process at this time. We have had a diversity of offerors. We have had

[1] The National Consumers League letter is reprinted in appendix G, p. 341.

varying degrees of success in terms of the development of standards by the offerors, success in terms of the amounts of work that the Commission might have subsequently had to do to the proposal from the offeror.

Mr. MOFFETT. Are you addressing the contention that Commissioner Pittle made that we are probably moving toward a point where nonindustry groups would not have a significant role to play?

Mr. KUSHNER. What I am really talking to is the notion that the Commission should serve as the offeror, should perform the function of the offeror in all cases. I think that our experience would not justify making such a dramatic change at this time.

Mr. MOFFETT. Commissioner Franklin?

Mrs. FRANKLIN. I have two points I want to make with respect to this whole offeror process and how it works.

First of all, I think the idea of that kind of a way of setting standards, meaning that the burden for the producing of the standard under the auspices of the Commission is on the private sector, is a unique idea for government. I happen to think it is a good idea because it guarantees the kinds of public participation on all sides of all interests that we want. I am not willing to let it go, and I am not willing at this point to say that the Commission should be the offeror. I am not willing to say that this process does not work. I think it is a good process. I think what we need to do is to tighten up the way we have implemented it.

I think Mr. Maguire's thought about guidelines as to how this process might better work is a very good idea. We know how the process has been working. I think we see where the bugs are. So, now would be a good time for us to tighten up the managements of it and to get it working perhaps a bit more expeditiously. In summary, I think the process is a good idea because it requires public participation in a way we have never had in government before. I don't think we can consider that government has all wisdom on all subjects.

Second, with respect to the whole financial question, I do consider this to be a rather thorny issue. I am on record in the NCL case that you referred to as being one who was not at that point willing to pay salaries for consumer representation. However, I said in my opinion at that time that it is going to be an open question for me because I don't know whether the process will work out without some additional financial subsidy so that we are sure we have the consumer interest represented.

My reason at the time for not opening the floodgates of funds was that once you open them you can't really shut them down. I thought since it was a new process we should see how it works and then decide what to do.

Mr. MOFFETT. You are talking about the per diem question?

Mrs. FRANKLIN. The consumer salary question that NCL had specifically raised. Consumers Union, I think, is raising a slightly different set of issues. Perhaps it is time once again for us to take a look at that whole financial situation with respect to how we deal with offerors. Perhaps we need a policy on the subject.

I would not like to see us, because of the way we are implementing the process, excluding some groups. That is rather unfair, and I think now is the time for us to look at the whole issue again.

Again what I am saying here is that I think the offeror process, the way the law is written, is a very unique and a good thing, and I am not willing to let it go.

Mr. MOFFETT. I am going to ask you to bear with us, we do have a vote, if I am not mistaken, on a very important resolution. So the Chair would ask the members to try and return here as soon as possible after voting.

Until that time the committee will stand in recess.

[Brief recess.]

Mr. MOFFETT. The hearing will come to order.

When we recessed the Chair was about to recognize the gentleman from Louisiana, Mr. Moore, for 5 minutes.

CONGRESSIONAL REVIEW OF COMMISSION RULES

Mr. MOORE. I thank you.

Mr. Chairman, if I may, I would like to ask several questions—and anyone else feel free to comment. You are aware, I am sure, of section 15 of H.R. 6844, the Consumer Product Safety Commission Improvement Act of 1975, which is currently in conference with the Senate. Section 15 calls for congressional review of the Commission's rules and regulations.

What is the position of the Commission with respect to section 15, the so-called Butler amendment?

Mr. SIMPSON. The Commission has not taken a position on the Butler amendment because it was introduced on the floor, I think, and not subject to the hearing we went through. So, I can only give a personal opinion on it and the others could give theirs.

I am in basic sympathy with the concept behind the Butler amendment which allows someone who has been injured by an action of the Commission to be able to easily seek compensation for that.

This is the review process, the Butler amendment.

Mr. MOORE. Right.

Mr. SIMPSON. Even on that one I am in basic sympathy with that because, if we have an independent agency—again it goes back to independent versus Cabinet agency—if you have an independent agency like this, the agency is tilted closer to being part of the legislative branch than the executive branch by law.

Then the concept behind that is one of accountability or checks and balances by the legislative branch on this agency which in theory it is close to being part of.

Even having sympathy with it, I don't think it would work. I think if we submitted all our standards and rules, it would almost be an impossible task for the Congress to again go through the same process we do. If you wanted to do that, you could almost abolish the middleman—that is, the Commission—abolish the middleman and do it at the outset. I am afraid it would tie us all down and simply not work.

Mr. MOORE. Are you aware that many independent agencies and administrative departments are already subject to this provision and it seems to work? This is not the first time it has been tried. The concept implements a 30-day waiting period from the time you propose a rule or regulation, and during that time Congress would be able to veto the regulation. If it did not, your agency would go on with the regulatory change.

Mr. SIMPSON. I have sympathy because they are independent agencies, but I question the whole concept of independent agencies.

Mr. MOORE. I do, too, but we have one here.

Mr. SIMPSON. To the extent you have that, I would prefer to state a better plan for the agency. You have already imposed requirements by statute on us to do economic impact studies. We can be challenged by the courts if we fail to do them or do them inadequately. I believe the procedural checks and balances are there. I think for us to submit a standard to you—take the standard on television sets or rotary power motors, or any of them—you are talking about a thick, complex document and I doubt in 30 days you would be able to do much of a job to it.

The second thing I believe is that it would be almost a basic inconsistency in the law in that when you created the Commission the Congress stated and went to great pains to create an agency independent and removed as far as possible from political influence and control, and I think in the time that you would have in the 30 days, you are back into the political influence and control. I don't think it is bad, but I think there is an inconsistency in it.

I think you would look at your constituency, and if we had proposed a regulation on bicycles and they were produced principally in your State, you might have a lot of pressure on you.

Mr. MOORE. Do you see any validity to the thought that has occurred to me with respect to the Butler amendment working to your advantage? If this procedure existed and if, within 30 days, neither House executed a process to veto your regulation, that inaction would fortify your position in implementing the new regulation? By failing to reject a new regulation, would Congress not be giving its support to your action and lessen criticism of it?

Mr. SIMPSON. You mean in court?

Mr. MOORE. I am thinking of the public criticism you get and the hesitancy you have in following your regulation.

You could say Congress indirectly approved it as well as approved its implementation.

Mr. SIMPSON. I think it might have some effect in that area. I think we probably have sufficient authority under our statute and I don't know that we have had that much criticism on the content of the regulations.

Mr. MOORE. The Commission, as I understand it, has not taken an official position for or against this provision.

Mr. SIMPSON. We have not.

LITIGATION AUTHORITY AND INDEPENDENCE

Mr. MOORE. I was listening to the comments of the Commission's General Counsel concerning the separate suit powers the Commissioan does not have and you seek. In other words, you propose to reject going through the Justice Department. Instead, you wish to have your own prosecuting agency. This worries me because once again we are dealing with the independent agency situation and the question of to whom an independent agency must answer. I don't think anybody is independent.

When we created this Federal Government we specified that the Supreme Court answers to the Constitution and to us by virtue of congressional impeachment powers. We answer to our voters back

home. The President answers also to the voters back home. It is the job of the President of the United States to administer the laws of the United States and he does so through one of his assistants, the Attorney General of the United States.

I wonder if we are not adding to the complexity and confusion involving the governmental process of this country through the proliferation and additional creation of new prosecuting agencies not responsible to the Attorney General, or the President, or the Congress, or the Supreme Court of the United States.

Mr. SIMPSON. There is that danger and I think you would in fact have another agency going into court. But we are talking of perhaps a total of 20 or 30 cases. Maybe you could limit it to 20 cases a year.

Conceptually I have a problem with it the same as I have a problem conceptually with the independent agencies and checks and balances, when you structure such an agency and make it judge, jury, and policeman. But when you say we already have it, and given the authority and resources you have given us, if you disregard the conceptual problem, I believe we would have a higher level of compliance if we took the cases all the way through.

Mr. MOORE. I command you on your forthrightness and honesty. However, on the second point there was a comment I would like to bring to your attention made by an Assistant U.S. Attorney, Mr. Joe Sims. He pointed out that the problem was not so much with his agency, but in many cases the tardiness of yours in getting cases to him.

Do you agree that has been a problem in the cases the Attorney General has failed to prosecute?

Mr. SIMPSON. I think it has been a problem. We are working on it but I think it is primarily an excuse for an Attorney General who does not want another agency to go into court.

Mr. MOFFETT. The time of the gentleman has expired.

The Chair recognizes counsel.

COMMISSION ENFORCEMENT RESOURCES

Mr. BROWN. Thank you, Mr. Chairman.

Chairman Simpson, in your opening statement that you delivered at the earlier session of this hearing, you alluded to the tremendous size of the compliance problem your agency faces and the small number of inspections that you are able to do. In terms of enforcement, what do you estimate is the size of the enforcement problem, that is, the probable number of violations as compared to the capabilities of the Commission to bring enforcement proceedings?

Mr. SIMPSON. It is difficult to answer that in the abstract, but if I could refer you to one of the charts—I could put the chart back up, perhaps—chart No. 11. That indicates some compliance programs where we have taken some samples, had inspections against some regulations and you will see the level of compliance rates of firms inspected run from 97-percent down to 54-percent compliance.

I can't answer in general because I don't have the resources to do a statistically valid sample to have been able to answer it in general. So I can answer only with some specifics.

For instance, in mattresses we have a 57-percent compliance rate where we inspected 350 firms. Of the 350 firms, 151 were in violation of the regulation and that is a problem. It is going to be a continual

problem because the industry is made up of a number of very small companies spread around the country. We are increasing communication to try to let them know what the levels are. We have held compliance seminars, we have worked with suppliers, had direct mailings to them. But we are going to have to do a little more.

Perhaps criminal prosecutions might do something although I doubt it in those cases because the concept of motivation by example wouldn't work primarily because I don't think these companies would know that the prosecution was there.

Mr. BROWN. What I am really driving at is more your enforcement capabilities than the compliance problem.

Let me ask the question this way. In a specific enforcement proceeding how would you weigh the capability of your agency in terms of legal expertise and technical expertise against the resources of the regulated industries? You might want to comment on the usefulness of the NEISS system.

Mr. SIMPSON. I think the injury data that we have is probably superior to most of those in the regulated industries, and I think they are using our data. It is very much of a plus. We find industries coming in and getting copies of the regulations. That is a plus.

I think with regard to technical expertise, we will always be overwhelmed on the technical expertise with 900 people compared to several million.

What we have tried to do is build a group of generalists who can understand the problems. We use consultants and universities to help in that. I don't feel we are technically overwhelmed but there is a problem and will continue to be.

EFFECT OF "OPENNESS" POLICY ON ENFORCEMENT

Mr. BROWN. There is some talk that your openness policy has some effect on your enforcement and regulatory capabilities. I know in the past you have on occasion made available to the public under the Freedom of Information Act internal memorandums prepared by staff, often including legal analyses that have been prepared to assist the Commissioners in evaluating cases.

In at least one instance, one of those memorandums was attached to the plaintiff's complaint and cited against the Commission.[1]

Do you think this aspect of your openness policy undercuts your enforcement and regulatory efforts and really gives private sector attorneys an advantage over your attorneys?

Mr. SIMPSON. It can, but I don't think so. We are split in the Commission on that. I personally don't believe it undercuts it. I think it strengthens the enforcement capability. I am convinced private industry is as smart as we are and can read the statute as well as we can, so the enforcement strategies available to us are relatively limited.

I think if we go up front and release the strategy and then prosecute, it strengthens rather than weakens the case. I believe that. So I am in favor of releasing the strategies.

Mr. BROWN. I think Commissioner Franklin has a comment.

Mrs. FRANKLIN. My view on that whole issue with respect to openness and the release of memorandums that do divulge our legal strat-

[1] *Committee for Hand Gun Control, Inc.* v. *CPSC*, 388 F. Supp. 216 (D.D.C. 1974).

egies is this. If I had voted for a regulation that I think is in the public interest, if there has been a violation of that regulation found by our staff, and I think we should proceed in whatever the appropriate direction is—whether with prosecution through the courts or whatever—then I do not think it is in the public interest to release our legal game plan to the other side. Period.

That is where openness, to me, stops. I just don't think that makes any sense if I am serious about protecting the public with that regulation.

So, therefore, I do not vote to release our legal strategy memorandums.

Mr. SIMPSON. Three to two voted to release it.

Mr. BROWN. That vote sometimes changes, doesn't it?

Mr. SIMPSON. I don't think it changes on the legal strategy memos. Excuse me, maybe this is the swing vote.

Mr. KUSHNER. With respect to my own view on this, I am inclined to be willing to release so-called legal strategy documents provided we aren't already in litigation. I think that was the one case in which I departed from what was generally a policy of releasing——

Mr. BROWN. What case was that? Was that the *Pactra* case?

Mr. KUSHNER. I am not certain of it. [Dr. Kushner subsequently advised the subcommittee that the case was *Pactra.*]

EFFECT OF "OPENNESS" POLICY ON ADVICE COMMISSIONERS RECEIVE

Mr. BROWN. One side of this issue is whether the openness gives an unfair advantage to the private party attorneys. The other side is whether it undercuts the advice that the Commissioners are getting themselves. For example, if every attorney in the agency knows that the legal memorandums that he is writing are going to be released to the public, maybe he is not going to give quite the kind of frank, candid advice you really need.

I would like you to comment on that, Chairman Simpson, and perhaps one way of seeing if this is really a problem is to consider whether your General Counsel ever gets telephone calls from Commissioners after they have read the legal memorandums asking for the real story and what is going on in this case.

Mr. SIMPSON. I would be pleased to hear his comment on that. As the outgoing chairman, he should not worry too much.

In my personal opinion, it does not undercut it. We have discussed this thing with our General Counsel and compliance staff. I am not aware of any inhibitions. I know it is unusual, but I am not aware of any inhibitions caused in the staff. Strategies have still come up. I voted in the majority to refuse to release the strategy on aluminum wire because the briefing packages we asked for were adversary packages. We released them all at once prior to litigation.

Again, I am not aware of any case that has turned on the release of such information, although I know they have been cited.

Mr. PITTLE. This is not an easy issue. It just does not present itself every time so that it is obviously one way or the other. The test I use before I vote whether or not to release material is to look first to the law to be sure I am not required to release it.

With respect to factual material, we are generally required to release it. With respect to material where the decision to release is discretionary, the test I use is whether or not this will protect the public. If our legal counsel or any of our technical advisers want to express their personal opinions about a particular strategy or a case and they are simply telling us how to prepare the best possible case, I don't vote to release the material merely to have CPSC known as the most open agency in town. I want to know if we are doing the best job. If I believe the release of that will reduce our effectiveness, I won't give it out.

Mr. MOFFETT. Mr. Collins.

Mr. COLLINS. I appreciate very much what the counsel was saying. I have a strong opinion of that. You turn over all your documents, and you won't get much input. We are carried away in this country about revealing everything, and you need a frank and candid expression, but many times in being too candid, the sources no longer will be frank with you. And in a consumer protection situation, you need frank input.

This is a key issue. I see it 3 to 2. Those voting for retaining confidence, some of us agree with you.

REGULATION OF FLAMMABILITY OF SLEEPWEAR

I want to go into this sleepwear; it is a specific field I know nothing about, but the whole idea just struck me wrong.

We had how many suppliers before, and how many do we have now that we have set up this impregnating cloth on sleepwear? How many made the cloth before, and how many make it now? Have we had anybody drop out of the fabric business?

Mr. SIMPSON. If so, I am not aware of that. The sleepwear standard is a performance standard and can be met by a chemical on the natural fiber, like cotton, or it can be met by synthetics with an inherent chemical. Both are being used. Some have switched to accommodate that to the synthetic fibers as opposed to the cotton fibers, but both are in the market today.

Mr. COLLINS. I understand this when it came in, it eliminated some from the market.

Mr. SIMPSON. I think the total amount of sleepwear sold is probably about the same.

Mr. COLLINS. But we are eliminating small people, and eliminating others?

Mr. SIMPSON. I don't know that there are any small producers of the fabric itself.

Mr. COLLINS. What happened to the price of the fabric from a rough unfinished fabric until we put in a specially produced fabric?

Mr. SIMPSON. If you are talking of synthetics, many are new, so I am not able to tell you what happens with the change. My understanding is they were comparable to the increased cost associated with cotton. On that the original cost estimate was done by the Commerce Department. I was involved in that and, as a matter of fact, I went outside and had Ernst & Ernst, the national accounting firm, do a cost estimate, and I had every element of cost asociated from the raw fiber to any added processing, the new equipment, increased weight, and increased insurance.

It turned out in their estimate the cost was less than 25 cents per garment. That is a yard and a half per garment.

Mr. COLLINS. That is the way they went in estimating. Could you have someone verify what it cost before, and what the selling price is right now?

Mr. SIMPSON. I am talking cost, not selling price.

Mr. COLLINS. That is right, but it is the selling price from the wholesaler to the store, I assume. What cost are you talking about?

Mr. SIMPSON. The added cost to a pair of pajamas associated with the standard, assuming the added cost to the producer of the fabric and all the way through the retail chain. If everybody added their cost on and, as a matter of fact, in that cost study, if they added on the profit to the added cost equal to their added profit in the chain, the total buildup was about 25 cents.

Mr. COLLINS. Just come to the total cost of the final garment when it got out at the end of the line.

Mr. SIMPSON. That is about 25 cents per garment.

Mr. COLLINS. Say it cost $2.50, it went to $2.75?

Mr. SIMPSON. If you are talking price, the cost in the market went up about $1 per garment. The percentage varied on the garment: some were $5 and went to $6; some were $3 and went to $4.

Mr. COLLINS. That is quite an increase, a 25-cent cost and $1 in retail.

Mr. SIMPSON. That is the estimate.

Mr. COLLINS. Many times in business or anything else, that Ernst & Ernst is a great accounting firm, but they base their estimates on projected figures, but what actually happens is what is important.

Mr. SIMPSON. What happened during that same period of time when the standard went into effect is that the cost of raw cotton went up so much that it swamped the overall cost of increase due to the flammability requirement. We had a shortage of cotton and the overall raw cotton price went up and overwhelmed it.

Mr. COLLINS. I would ask unanimous consent that we have that direct information as to the cost—I withdraw that about price, I want the true cost.

Mr. SIMPSON. It is in a document in the Commerce Department files and is about 5 years old.

Mr. MOFFETT. Would you provide it to the committee?

Mr. SIMPSON. We would be glad to.

Mr. MOFFETT. It is so ordered.

[The following document was received for the record:]

UNITED STATES DEPARTMENT OF COMMERCE
Washington, D.C. 20230

March 19, 1970

MEMORANDUM TO: Flammable Fabrics Act File

SUBJECT: Visit to Rock Hill Printing and Finishing Company (division of M. Lowenstein & Sons)

NOTE: The cost data in this memorandum was given and received in confidence and should be treated as such.

Bill Segall and I visited this facility on March 17, 1970. We discussed the processes that materials follow that are affected by the fire retardance treatment.

1. Napping -- this process is the same although some added tensile testing is required due to the fact that both napping and the FR treatment tend to reduce strength. Care is needed to insure a usable strength after the napping operation.

2. Printing -- there is some limitation on colors that can be used (inexpensive pigment prints cannot be used) and there is an absorbency requirement that must be met to allow the fire retardant chemicals to penetrate.

3. There is a PH check made before the FR bath. The CIBA process needs a PH less than seven to apply the FR chemicals.

4. This plant has acquired a simple electronic device (Aquatech) which measures the amount of FR chemicals applied at the padding station.

5. After the FR chemicals are applied, they are polymerized in a high-temperature curing process.

6. The material is then run through a washing process to remove unreacted materials and to restore proper "handle" to the cloth.

7. The plant, in cooperation with Sears, employs a marking system, unusual for them, to identify a completed garment back to the source roll.

8. This plant also maintains a distinction between FR prints and non-treated prints. A design produced as a FR material cannot be used on a non-FR process.

9. The plant checks fairly extensively every roll (2000 yards) and a simple test (match test) is performed every piece (60-100 yards). The laboratory at their Lyman plant acts as a check on Rock Hill by duplicating the 2000 yd. tests. Also the cutter applies a match test to every piece.

10. They have had no failures of the flame test during the previous six months at least. The process appears to be under control.

We discussed the subject of costs of the FR process in some detail with Messrs. Lund, Reese and Grier. The Lowenstein Fabrics operation is divided into what they term three divisions -- Weaving, Finishing, Sales. We were given the following cost information:

Gray goods are received from the Weaving Division at a cost to Rock Hill of 30¢/yard.

Rock Hill prints and finishes non-FR-treated goods and sells them to the Sales Division for 38-40¢/yard.

Rock Hill prints and finishes FR-treated goods and sells to Sales Division at 58¢/yard. The 18-20¢/yard difference includes the Rock Hill Division profit.

We were given the following breakdown of the 18-20¢ add-on:

Q.C. costs	2-3¢/yard
*FR chemicals	9.25-9.75¢/yard
Added finishing costs	6.75-7.25¢/yard
	18-20¢/yard

Personal Observations and Opinions

1. They are being super cautious due to nature of this product and the potential liability associated with FR materials. Since they have had no failures at Q.C. test points, I would guess that large volume and a competitive market would bring the Q.C. costs down to approximately 1¢/yard rather than the 2-3¢/yard.

2. The material after the FR treatment has a durable press feature automatically as a side benefit. If this feature were bought as a separate item, it would cost 3-4¢/yard (we were told). We may wish to take part of this into account in our evaluation if the benefit can be separately marketed. If so, we may claim approximately 1¢/yard saving.

3. We were told by CIBA that in large volume the chemicals may drop to 50¢/lb. This would reflect an additional 3-4¢/yard saving.

4. Since non-FR material is wholly processed by this plant for 8-10¢/yard, it seems high that the additional processing for FR would be 6.75 to 7.25¢/yard in a competitive market. My guess is that this would not be much over 3¢ a yard.

* Reflects 2.25¢/yd. decrease as result of CIBA chemicals being reduced from 1.00 to 80¢ per lb.

5. If 1, 2, 3, and 4 have any validity, we may project a high volume competitive add-on for FR as follows:

	Present	Future
Q.C.	2-3¢/yard	1¢/yard
FR Chemicals	9.25-9.75¢/yard	5.85-6.35¢/yard
Dur. Press. Saving	-0-	-1¢/yard
Added Fin. Costs	6.75-7.25¢/yard	3¢/yard
	18-20¢/yard	8.85-9.35¢/yard

Or we may have a FR treatment for cotton flannelette for approximately 10¢ a yard at the Finisher's level in the manufacturing process.

Prepared by Richard O. Simpson
Deputy Assistant Secretary for Product Standards
U. S. Department of Commerce

Mr. COLLINS. You say the cost of the cloth itself you could show as part of that, what effect it had on the cost of cloth?

Mr. SIMPSON. I am talking about the total cost of 25 cents, the bulk of that is on the fabric producer because he is the one adding the chemical. There is little other cost. You cut and sewed before and packaged before.

COST OF SAFETY REGULATION

Mr. COLLINS. It might be harder.

Do you run a cost analysis every time we come up with a safety program?

Mr. SIMPSON. Yes.

Mr. COLLINS. Is that specified in the bill, or do you do that as a matter of logic?

Mr. SIMPSON. It is specified in the Consumer Product Safety Act in detail. It is not specified in the other acts, but we take the burden on ourselves because we think it makes good sense.

Mr. COLLINS. What effect does that have on your decisions?

Mr. SIMPSON. It is required, and we consider the cost to the consumer, cost to the industry, and we can be challenged and the standard can be stricken if we fail to do all of these things. It is an integral part of the decisionmaking.

Mr. MOFFETT. The Chair recognizes the gentleman from New Jersey.

COMMISSION'S ROLE IN STANDARDS DEVELOPMENT

Mr. MAGUIRE. Thank you, Mr. Chairman.

We left off when we were talking before on the question of adequate compensation for consumer participation. I understand that you and Commissioner Pittle believe that one of the ways to solve this problem is to have the Commission become the offeror, is that correct?

Mr. SIMPSON. No.

Mr. MAGUIRE. That is not correct?

Mr. PITTLE. To provide money to the offeror so the offeror can pay a consultant's fee or salary to technical experts to be on the non-industry side? If that is what you mean, that is what I mean.

Mr. MAGUIRE. You didn't want the Commission to become the offeror?

Mr. PITTLE. I think we are getting into a bit of confusion over the word "offeror." If you substitute the words "standards manager," someone to sit at the head of the table, provide the table, the electricity, reproducing machines, that is the offeror. He doesn't sit down and write out the standard himself; he provides the table and manages the process. He goes out and gets people from all parts of our society to come in and participate.

Mr. SIMPSON. He convenes a committee, and may or may not be a part of that committee.

Mr. MAGUIRE. The practice, I thought we said earlier in our exchange, was such that the offeror, or the manager, whatever you want to call him—and all the documents I have in front of me refer to him as the offeror—does have tremendous impact on the standard itself. We discussed that point.

Mr. SIMPSON. I think what I said is he has the potential of having a substantial impact if he chooses to exercise that. But in each case

we have known, the role of the offeror is in moving the process forward. In most of the cases the offeror convenes a committee, and he is not a member of the committee but he provides the procedures by which the committee operates.

Mr. MAGUIRE. I understand that, but you also said, Commissioner, that he had it left to him to decide whether or not he would be ruled by a majority of the committee or submit his own proposal.

Mr. SIMPSON. That is right.

Mr. MAGUIRE. So he has a substantial role to play in the process.

Mr. SIMPSON. He can exercise almost an overriding role, but we insist that all views of all participants be known to us. He could abuse the authority.

Mr. MAGUIRE. Whether you call him an offeror or manager, your proposal on page 13 of your testimony is that that role be played by the Commission in the future.

Mr. SIMPSON. That is right, the managerial role.

Mr. MAGUIRE. Do you agree with that?

Mr. PITTLE. Yes.

FUNDING OF CONSUMER REPRESENTATIVES IN OFFEROR PROCESS

Mr. MAGUIRE. Once having said that, we are still left with the question of adequate consumer representation, the process and funding for that adequate representation. Is it the view of either of you, by having the Commission serve as manager or offerer, that that will reduce to any degree whatsoever the dollars that will be required to fund adequate consumer representation?

Mr. SIMPSON. No.

Mr. PITTLE. I think they are two somewhat separate issues.

Mr. SIMPSON. I think it may have a little effect in that I believe the process will move faster so the total number of hours involved will be less.

Mr. MAGUIRE. Let's go to the question of funding, whether we continue under the existing procedure or adopt the suggestion you have made. How much money is going to be made available to consumer groups? You know you varied all over the place from $20,000 to $160,000. Now you are asking for $80,000 on top of that. What is your best judgment? Are you going to be able to do it so that we have a meaningful consumer representational process here?

Mr. SIMPSON. I would say for myself, and I believe the unanimous view of the Commissioners is that there should be and must be meaningful consumer participation in all of the offeror processes.

Mr. MAGUIRE. How does that translate into dollars? Do you give them what they need to do the job? That is the question.

Mr. SIMPSON. What we have given them where requested is an offset against transportation and per diem cost of consumer participants. We have not yet funded any salary, so that the consumer sitting there would receive a salary, and in my opinion that would be a last resort.

Mr. MAGUIRE. How can somebody give all their time on a volunteer basis on something as complex and time consuming as this?

Mr. SIMPSON. We have found, Mr. Maquire, that people do that. They have given the time—it has been a considerable amount of time—voluntarily and we have called them into Washington and we asked them——

Mr. MAGUIRE. But the Consumers Union is saying they are not going to do it again.

Mr. SIMPSON. They are not the participants, they are the managers of the offeror process.

Mr. MAGUIRE. So the cost will be affected by their changing from manager to you as manager.

Mr. SIMPSON. The burden of the managerial cost would be borne by the Commission.

Mr. MAGUIRE. You are in the middle of rethinking that, aren't you, Commissioner Franklin?

Mrs. FRANKLIN. Yes.

Mr. MAGUIRE. How do you feel, Commissioner Kushner, about the salary question?

Mr. KUSHNER. I believe that the Commission's experience until now supports the notion one does not need to provide salaries in order to get highly qualified technical experts to participate as consumer representatives in the process.

Mr. MAGUIRE. Commissioner Pittle?

Mr. PITTLE. I couldn't disagree more. I believe the only way we will ever get proper technical expertise for consumers is to provide compensation. Think of the time you first walked into your office and imagine that you were told you had no money to pay for a legal assistant, or for a secretary, or any of the other people you need on your staff. You couldn't participate in this Congress and be up on the issues and challenge the arguments unless you had technical experts within your grasp. When consumers and other nonindustry people participate in this process they must be able to turn to an engineer, economist, or architect to ask technical, substantive questions. They need someone not economically involved, whose salary is not paid by the industry being regulated. Unless consumers can do this I submit they are disadvantaged.

I advocate this more so now. I was reluctant in the beginning because I felt volunteer persons might supply this expertise, but the people having this talent can't afford to leave their jobs and volunteer to come and spend days and days on one of these processes.

Mr. SIMPSON. Maybe there is a confusion. Consumers Union was not representing consumers in the lawn mower standard development. There were other consumers who were representing the consumers' views in that development. Consumers Union was the manager of the process and it would have been unacceptable for us to have them be the sole consumer representative. There were many other people representing the consumer on those committees.

Mr. MOFFETT. Mr. Moore.

REGULATION OF HANDGUN AMMUNITION

Mr. MOORE. Thank you, Mr. Chairman.

What is the present status of the Commission's attempt to ban the manufacture and sales of handguns and ammunition? As I recall, a court decision placed the question of CPSC authority in this matter back in your bailiwick.

Mr. SIMPSON. It is right back in your bailiwick. There were legislative amendments introduced, in fact recommended by this committee.

Mr. MOORE. Such language appeared in both bills?

Mr. SIMPSON. Yes. But it has never come out of Congress.

Mr. MOORE. I understood that the courts ordered you to consider this.

Mr. SIMPSON. The court ordered us to publish the petition for comment, which we did. The appropriation bill that was signed that we are currently funded under said, "You shall not spend any of the money in consideration of that petition." So right now we are in a stalemate because we are under obligation to go forward under the merits but can't spend any money to do so.

There was a recent court case where the committee for handgun control wanted us to go forward on that, but it was thrown out of court because of the language in the appropriation bill. An amendment to remove jurisdiction was in both bills and is before both Houses.

Mr. MOORE. So you will take no action under this bill?

Mr. SIMPSON. That is correct. It was forbidden.

Mr. MOORE. I yield back the balance of my time.

Mr. MAGUIRE [presiding]. The gentleman from Texas, Mr. Collins.

REGULATION OF FABRIC FLAMMABILITY

Mr. COLLINS. I wanted to go into this one subject and explore more about the flammability of fabrics because we passed the law in Congress and sometimes it requires a great deal of commonsense the way we prepare this legislation. That is why we appreciate the position of you men and women on the Commission.

One thing that comes into this flammability of fabrics is this question of soap. As I understand it, you can put this stuff in this noninflammable condition and they put it in a washing machine and after three washings there is no difference in it and a flammable product.

Mr. SIMPSON. If the product is produced of synthetic fibers and it meets the flammability requirement because of that, then it is generally unaffected by washings. If the product meets the flammability requirement by a chemical treatment, then the chemical treatment is somewhat adversely affected by washing in non-phosphate-based detergents so the effect varies around the country depending on the local option of how they dealt with phosphate detergents.

Mrs. FRANKLIN. You raise a case which I think is a classic in terms of the need for regulatory reform. The issue is really this. The children's sleepwear regulation is a Federal regulation in force in all States which was put into effect to make sure that children are not burned so severely if they happen to get into a fire situation wearing the sleepwear.

On the other hand, there are localities around the country that have banned the use of detergents with phosphates in them, such as Nassau County, Dade County in Florida, a county around Chicago.

The Chairman has explained what happens when you wash the flame resistant garment in the nonphosphate detergent——

Mr. COLLINS. We are in a city that requires that you cannot use phosphates? Let's carry the situation all the way through.

Mrs. FRANKLIN. I am being a shade philosophical.

Mr. COLLINS. I heard in New York——

Mrs. FRANKLIN. Nassau County has such a rule.

My point with respect to regulatory reform is that we have conflicting regulations. You have a regulation that is meant for child safety and a regulation that is meant for pollution control. They are in conflict and there is no mechanism to resolve this.

To make it even worse, one is a Federal regulation, and one is a local regulation. Who gets stuck in this? The poor consumer.

Mr. SIMPSON. Let me say the chemical treatment of the cotton is adversely affected by several things, one is washing in non-phosphate-based detergents, another is extensive use of bleaches, another is exposure to ultraviolet, such as drying on the line at a high altitude in sun.

We require by the regulation that the product be flame retardant, that is, that it meet the standard of 50 washings, standard washings. That takes into account temperature of water, hardness of water, but it uses a phosphate based detergent. It doesn't wash out this thing in three washings, it might be 25, 30, or 40 washings, and, when it washes it out it doesn't mean it becomes hazardous, that means it may fail the standard, but by any practical measure it is so much safer than the product not treated at all that there is really no question. The safety is there, it just is not as safe as the other way.

Mr. MAGUIRE. Your time has expired.

CONFLICTING REGULATORY POLICIES

Mrs. FRANKLIN. On this point may I make a plea to the committee in your consideration of the whole regulatory reform area that I think there needs to be some thought given to some kind of mechanism to resolve conflicts between regulations. This is a classic case of a conflict between pollution and child safety, and between national or Federal regulation and a local regulation. There is no mechanism to resolve that kind of conflict, and it is the consumer who always pays somehow.

Mr. SIMPSON. I can suggest one mechanism that would resolve it quickly, that is to eliminate the requirement and make it mandatory the children's sleepwear has to pass the standard no matter what the washing would be, and the practical effect is it would eliminate all cotton.

OFFICE OF PUBLIC COUNSEL

Mr. MAGUIRE. Going back to the question of how much it costs consumers and where you can save money by reorganizing this thing a little bit. Would not the office of a public counsel provide legal and technical assistance and reduce the necessity to reimburse consumers?

Mr. SIMPSON. You mean the agency?

Mr. MAGUIRE. Not eliminate all together, but cut down if cost is a problem.

Mr. SIMPSON. I don't believe the cost is a real problem, at least in my opinion it is not.

Mr. MAGUIRE. Everybody else thinks it is.

Mr. SIMPSON. I don't know who. Consumers Union—it is expensive to be an offeror, for instance, I think the National Swimming Pool Institute estimated that it cost them a couple hundred thousand dollars to be the offeror.

Mr. MAGUIRE. Leave aside the question of whether it is expensive or not, that is another question.

The question is, if you have a public counsel's office with legal and technical expertise, would that facilitate the process of consumers being more adequately represented in the process, having access to technical and legal help they would need?

Mr. SIMPSON. I presently don't think it would, and we have in fact funded technical support for the offeror process. In the public playground equipment we funded $80,000, and retained a consultant.

Mr. MAGUIRE. Do any of you think that makes sense, a public counsel's office?

Mr. PITTLE. I don't know what you mean. Do you mean somebody who already works for the Commission?

Mr. MAGUIRE. If nobody understands the concept, I won't waste my 5 minutes talking about it.

COMPARISON OF REGULATORY AUTHORITY UNDER VARIOUS ACTS ADMINISTERED BY CPSC

Let me turn to another issue. Under subsection 30(d) which you referred to in your statement, where you are involved with several other acts in addition to the CPSA, you are recommending that you be collapsed, if you will, under the CPSA.

Mr. SIMPSON. Yes.

Mr. MAGUIRE. I read some of the memorandums prepared by the Georgetown law people,[1] and one of the points they make is that under the Hazardous Substances Act you get a self-enforcing capability to ban something quickly whereas under the CPSA you get into trial type hearings, and the thing can be stretched out endlessly.

What is your comment on that particular apparent weakness of the proposal that you have made?

Mr. SIMPSON. I think if you compare feature to feature and take account of the consumer view, I personally don't believe it is onerous. If you are talking of the imminent hazard feature, under the HSA we can declare a product a hazard by vote of the Commission, under the CPSA we have to go to the court. I don't think that is a great problem. It is, I think, a check on the agency. I don't think it is an onerous problem, nor a terribly important provision that is used often.

If you compare section 15 requirements and the authority to require repurchase, repair, or replacement under the CPSA, that is a feature that only partially exists in the other acts.

Mr. MAGUIRE. We are talking here about trial type hearings.

Mr. SIMPSON. We have administrative hearings under both statutes.

Mr. MAGUIRE. But you need not have them in all cases, is that right?

Mr. SIMPSON. Under the imminent hazard provision of the HSA you don't have to have, we can declare a product a hazard. Under the HSA, the section 701(e) of the Food, Drug and Cosmetic Act administrative process is probably the most cumbersome, drawn out procedure we have under any of the statutes we administer. I think it would be a plus and a boon to abolish that.

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[1] See hearings on S. 644 and S. 1000 before the Subcommittee for Consumers of the Senate Committee on Commerce, 94th Cong., first sess., serial No. 94–12, at pp. 148–54 (1975).

PETITION PROBLEM

Mr. MAGUIRE. Let me go to another question that relates to your point that the petitioning process forces you to waste time on low priority work. I wonder how many times has the Commission been brought to court for denying a petition?

Mr. SIMPSON. We have not at all because no one had the authority to take us to court until October of 1975. That provision didn't take effect until 3 years after the bill was signed. I suspect we will be in court fairly soon.

Mr. MAGUIRE. Don't you think the courts might be sympathetic to the argument, when and if that happens, that you have to spend your time on the high priority things, therefore while there might be some showing of risk or danger over here, that the numbers involved are so much less that in fact you would be able to proceed on your own priorities without a lot of danger under this particular provision?

Mr. SIMPSON. If the Congress feels that that is the way in which they would like us—I argue it is in the public interest to do so—then I believe the appropriate way to correct it is legislatively and not depend on the courts.

Mr. MAGUIRE. You haven't necessarily been completely unable to make priority judgments?

Mr. SIMPSON. We have taken the view as a collegial body that, if a petition is sent to us, and we believe as a majority, that it presents an unreasonable risk, we take the view we must grant the petition.

Mr. MAGUIRE. Even though it might risk three people and something else you are working on might risk 3 million?

Mr. SIMPSON. I think 3 million is an unfair comparison, but if you want to compare 30,000 to 3, yes, we do.

Mr. MAGUIRE. The statute says "unreasonable risk and also unreasonably exposes the petitioner or consumers," which would seem to me to give adequate discretion for making priority judgments.

Mr. SIMPSON. I would be more than pleased if that is your view and the amendment would make it so we are not challenged in court. We have not been operating in that manner.

Mr. MAGUIRE. That is apparent from your testimony.

I call on staff counsel, Mr. Brown.

GENERAL COUNSEL LEGAL MEMORANDUM ON PETITION PROBLEM

Mr. BROWN. Thank you, Mr. Chairman.

Yesterday, Chairman Simpson, in your testimony before Senator Proxmire's Appropriations Subcommittee, you were asked about this petition problem, and that subcommittee suggested General Counsel prepare a legal memorandum supporting your position on your interpretation of section 10.

I wonder if this subcommittee could have a copy of that opinion for the record?

Mr. SIMPSON. Certainly.

[The opinion appears at p. 95.]

Mr. BROWN. I would ask specifically in that memorandum that you address the argument that Mr. Maguire has just made. That argument essentially is that under section 10 the standard for judicial

review of the Commission denial of petition is essentially a two-pronged test, the first test being whether the product produces an unreasonable risk of injury, and the second being whether the Commission's denial of the petition would unreasonably expose the petitioner or other consumers to risk of injury.

It seems to me the second prong of the test offers a very strong legal position to the Commission to deny petitions that do rank low in your priority order.

COURT ACTION INVOLVING PETITION

Another question I had about your petition problem, since you have spoken about the October 1975 effective date of the judicial review provision of section 10, is how many petitions have been filed since that judicial review provision became effective?

Mr. SIMPSON. Since October of 1975?

Mr. BROWN. Yes.

Mr. SIMPSON. I don't have the number of how many have come in. I suspect the first that may be tested in court is the one on fluorocarbon ozone, the third petition.

Mr. BROWN. Is there an increasing trend of petitions? Are you getting more petitions since petitioners now can take you to court?

Mr. SIMPSON. You know in 3 months compared to 3 years, I don't know if I can tell you a trend.

Mr. Parent says he believes six have come in.

Mr. BROWN. Were 50 consumers sitting on your doorstep as of October 27?

Mr. SIMPSON. No.

Mr. BROWN. Could you submit the number of petitions filed?

[The following information was received for the record:]

Five petitions have been filed under the CPSA since October 27, 1975.

Mr. SIMPSON. My problem on petitions is not the problem associated with going to court. My problem is what the authority is for denial, and how you can put it in a priority system, regardless, and I would say, even if you accepted the amendment—again lawyers argue, and I am not a lawyer—but even if you accepted the amendment that would allow the Commission to deny a petition, even if we believed it's an unreasonable risk, but there are other more unreasonable risks, I would still allow the petitioner the right to challenge the Commission on that priority ranking.

I think that is what the Congress had in mind when you granted the right of petition, to prevent these bureaucracies from working on what they want to work on instead of what citizens want.

DEFINITION OF A PETITION

Mr. BROWN. Section 10 in subsection (b) sets out specific requirements for what a petition should contain. Do you read those requirements stringently and treat only petitions that meet those requirements as section 10 petitions and treat all the rest as Administrative Procedure Act section 553(e) petitions?

Mr. SIMPSON. No. We have taken a fairly liberal interpretation of that because we believe that is what Congress has in mind.

In other words, we don't require that a petition must be on this form, and all the blocks be filled out. If a person says he is asking you to write a standard, we consider that a petition.

Mr. BROWN. Section 10 provides that they are to establish risk, give a brief description, et cetera. Congress set forth certain requirements.

Mr. SIMPSON. Yes. But if we took a rigid look at that, what would happen in most cases is we would deny most petitions. They don't have the resources that we have. We have taken a liberal view and said we will treat it as a petition, with the data the petitioner supplied, and the data available to us, and consider it all in the determination.

I personally wouldn't like to change that. I wouldn't like to throw up procedural roadblocks.

Mr. BROWN. Your staff performs an independent evaluation in the cases where you do get consumer petitions? It seems to me a petition might not provide the kind of detailed factual information needed for determination of whether to grant the petition but could still meet the section 10 requirements and then your staff could flesh it out.

Mr. SIMPSON. I will let General Counsel explain the procedure.

Mr. MICHAEL BROWN. When a communication comes in to the Commission, it is received by the Office of the Secretary. If the Office of the Secretary has any questions as to whether it is a complaint or a petition, it is sent to the General Counsel's office. It is reviewed there and classified as a petition or——

Mr. BROWN. Have you promulgated regulations that would specify, essentially implementing section 10(b), what is a section 10 petition?

Mr. MICHAEL BROWN. We have been working on guidelines for this.

Mr. BROWN. That would be a rule?

Mr. MICHAEL BROWN. This would again be guidance.

Mr. BROWN. Will that policy essentially specify the Commission's regulatory development priority, as well? For example, are you considering a rule setting out the Commission's regulatory development priorities, which could be changed from time to time, and then stating in addition that the Commission makes a finding that denial of any petition pertaining to a product which was low on that priority list in relation to the current regulatory development priorities of the Commission would not unreasonably expose the petitioner to product hazard?

Mr. MICHAEL BROWN. We have no provision like that.

Mr. BROWN. Has there been consideration of that?

Mr. MICHAEL BROWN. The Commissioners have been considering it.

Mr. SIMPSON. Unless we were willing to test it in court, my personal opinion is that the way we have been operating, and the way I have been interpreting the statute, and I believe the correct one, is that the threshold determination is, does it present an unreasonable risk? I think the priorities are out of whack.

I believe if the Commission had adequate resources to address about half its rulemaking, maybe more than half, to internally generated priorities, and the other half to externally generated priorities, I would have no problem.

EFFECT OF APPROPRIATIONS ON PETITION PROBLEM

Mr. BROWN. Supposing your appropriations earmarked a certain part of your money for citizen petitions——

Mr. SIMPSON. I think it would be very laudable.

Mr. BROWN. Do you think that would achieve the same effect?

Mr. SIMPSON. Yes; it would.

Mr. BROWN. I wonder, Mr. Brown, in the legal memo you are going to prepare, if you could consider the effect of that sort of budget provision, and also if you could consider the suggestion I made a moment ago about promulgating the rule setting out the Commission's regulatory priorities, and then using that rule as the authority for denying a section 10 petition, essentially under what I referred to as the second prong of the test.

I know, Mr. Simpson, you are saying you really don't want to go to court. I think that is a laudable philosophy.

Mr. SIMPSON. I am saying I really don't want to go as far as that. If one could draft such a rule and moot the entire right of the petitioner, I wouldn't go that far. We underwrite fire and shock hazard, so I think to underwrite a petition is good and valid. I just want to set a proper perspective.

Mr. BROWN. I wouldn't suggest the rule block consumer petitions.

Mr. SIMPSON. If you could accomplish that by rule to put it in some balance, I personally would be in favor of it.

Mr. BROWN. All I am suggesting is, given the fact you are stuck with your statute for at least a little while longer, and limited appropriations, that there may be other solutions to the problem.

Mr. SIMPSON. Yes.

[The Commission's General Counsel submitted the following memorandum for the record:]

DISCUSSION PAPER

THE ROLE OF CONSUMER PRODUCT SAFETY COMMISSION RESOURCES AND PRIORITES IN MAKING DECISIONS ON PETITIONS FILED UNDER SECTION 10 OF THE CONSUMER PRODUCT SAFETY ACT[1/]

I. INTRODUCTION

During hearings of the Subcommittee on HUD-Independent Agencies, Committee on Appropriations, United States Senate, on February 18, 1976, a question arose concerning the possible use of priorities and lack of resources by the Consumer Product Safety Commission ("Commission" or "CPSC") as a defense to a law suit under section 10(e) of the Consumer Product Safety Act ("CPSA") (15 U.S.C. 2059(e)). This type of law suit, consisting of a trial de novo in a federal district court, could follow a Commission denial of a petition to ban a consumer product or mandate a safety standard. The consequence of such a court action could be an order to the Commission requiring it to commence a rulemaking proceeding under section 7 or 8 of the CPSA (15 U.S.C. 2056, 2057). This question raised at the hearings was addressed in a letter of February 25, 1976 (attached) to the Senate Subcommittee wherein the General Counsel of the Commission concluded that it would be difficult to convince courts not to order the commencement of a rulemaking proceeding after petitioners had met their statutory burdens.

1/ The views expressed in this paper are those of the General Counsel of the Commission, and are not necessarily those of the Consumer Product Safety Commission or any of its Commissioners.

The questions addressed in this discussion paper are significantly broader than the issue discussed in the February 25 letter. In that letter it was accepted as fact that the petitioner seeking judicial review of a Commission decision was able to meet the statutory burden set forth in section 10(e)(2) of the CPSA. The questions addressed in this discussion paper arose at hearings before the Subcommittee on Oversight and Investigation of the Committee on Interstate and Foreign Commerce, House of Representatives, February 19, 1976, and deal with whether, based on (1) statutory language, (2) Commission rulemaking, or (3) specific limiting appropriations legislation, Commission priorities and resource limitations could be legitimately considered by the Commission in deciding petitions under section 10 of the CPSA.

After reviewing in general the statutory background relating to petitions, this paper will examine the language of the CPSA as it pertains to the role of Commission priorities and resources as a basis for a decision to grant or deny a section 10 petition. This will be followed by a discussion of (1) the possibility of the Commission's issuing procedural rules to expressly provide that resources and priorities are relevant factors in deciding petitions, and (2) the possibility of using appropriations legislation to limit petition consideration.

II. STATUTORY BACKGROUND

In addition to the right provided by the Administrative Procedure Act of interested persons to petition federal agencies for the issuance, amendment, or repeal of a rule (5 U.S.C. 553(e)), section 10 of the CPSA provides a mechanism whereby an interested person may petition and, ultimately upon court order, require the Commission to "commence a proceeding for the issuance, amendment, or revocation of a consumer product safety rule". A "consumer product safety rule" is defined in section 3(a)(2) of the Act as a consumer product safety standard or a rule declaring a product to be a banned hazardous product. Proceedings to issue such rules may be commenced either by (1) a pre-rulemaking procedure under section 7 of the Act which invites interested persons to offer to develop standards (or to submit existing standards to be utilized as a proposed rule), or (2) a procedure under sections 8 and 9 of the Act to propose a rule declaring a product to be banned. In essence, therefore, a court can order the Commission to begin proceedings for a safety standard or ban, but it cannot, under section 10, require that the Commission complete the rulemaking.

Section 10 further provides that a petitioner must briefly set forth the substance of the rule it is asking the

Commission to issue and facts which are alleged to substantiate the need for the rule. The Commission, in evaluating the allegations, must take whatever steps it deems are necessary, including the holding of a hearing, to properly evaluate the petition and must, within 120 days of its filing, either grant or deny the petition. If the petition is denied, the reasons for denial must be published in the Federal Register (the Act does not list legally permissible reasons). If the petition is denied, or if no action is taken within the 120 day period, the petitioner may bring an action in a federal district court to compel the Commission to commence rulemaking. Unlike typical reviews of agency actions, however, which are normally based on whether there was "substantial evidence"[2/] to support the decision, or on whether the agency action was "arbitrary and capricious" or an "abuse of discretion",[3/] a section 10 review consists of a "de novo"[4/] proceeding. After this proceeding, if the court finds that petitioner was able to convince it by a "preponderence of the evidence"[5/] (1) that

2/ See, e.g., Section 11, CPSA, 15 U.S.C. 2060(c); the Administrative Procedure Act, 5 U.S.C. 706(2)(E).

3/ See, e.g., 5 U.S.C. 706(2)(A).

4/ 15 U.S.C. 2059(e)(2).

5/ Id.

the consumer product presents an unreasonable risk of injury, and (2) that the Commission, by its failure to commence a rulemaking proceeding, unreasonably exposes the petitioner or other consumers to a risk of injury presented by the consumer product, the court is directed to order the Commission to initiate the action requested. The term, "risk of injury", is defined in section 3(a)(3) of the Act as a risk of death, personal injury, or serious or frequent illness.

III. CPSC PRIORITIES AND RESOURCES AS THEY RELATE TO STATUTORY CRITERIA IN DECIDING PETITIONS UNDER SECTION 10.

A. Unreasonable Risk of Injury

As summarized above, the statutory criteria which must be satisfied before a court is authorized to order the Commission to commence a proceeding are (1) that the consumer product presents an unreasonable risk of injury, and (2) that the failure of the Commission to initiate a rulemaking proceeding under section 7 or 8 unreasonably exposes the petitioner or other consumers to a risk of injury presented by the consumer product. As suggested in the General Counsel's February 25, 1976, letter to the Senate Subcommittee, it would be very difficult to convince a court not to order the commencement of a proceeding after the statutory criteria have been proved to the requisite degree, even though the risk of injury may not fit into the Commission's priorities

or resource capability. Accordingly, it would be necessary, to succeed with the court, to show that priorities and resources are in fact elements of an essential statutory criterion itself.

The first criterion, that the product presents an "unreasonable risk of injury" is undefined in the CPSA. Since, in section 3, a "risk of injury" is defined as a risk of death, personal injury, or serious or frequent illness, an unreasonable risk of injury is an unreasonable risk of death, personal injury, or serious or frequent illness. However, this addition offers no guidance because the word, "unreasonable" remains undefined. The House Committee, in reporting out its version of what was to become the Consumer Product Safety Act, recognized and commented on the fact that the term "unreasonable risk of injury" (referred to in that bill as "unreasonable hazard") was undefined in the legislation, and the Committee noted that:

> "Your committee has not included a definition of 'unreasonable hazards' within this bill.... It is generally expected that the determination of unreasonable hazard will involve the Commission in balancing the probability that risk will result in harm and the gravity of such harm against the effect on the product's utility, cost, and availability to the consumer." H.R. Rep. No. 1153, 92d Cong., 2d Sess. 33 (1972).

The Senate Commerce Committee Report (S. Rep. No. 749, 92d Cong., 2d Sess. 14 (1972)) sets forth a similar "balancing test" for determining unreasonable risk of injury. In addition, the findings required at the end of the rule-making process in section 9(c) of the CPSA provide for an analysis in terms of similar factors. It is therefore clear that while not necessarily the exclusive factors to be considered by the Commission or a court in determining whether the consumer product presents an unreasonable risk of injury, such matters as the likelihood that injuries will occur and the severity of potential injuries should be weighed against the potential effect of a consumer product safety rule on the usefulness, cost, and availability of the product.

Two opposing positions follow on the role of CPSC priorities and resources in making unreasonable risk of injury determinations.

1. Unreasonable Risk Of Injury Determinations Involve Consideration Of CPSC Priorities And Resources.

An argument can be made that consideration of whether an unreasonable risk of injury is presented by a consumer product permits, under the statutory scheme discussed above, a comparison of the risk of injury presented by the product with the risks of injury presented by other consumer products. If such comparisons are legally acceptable, the Commission could establish a priority or ranking system. Thus,

the Commission would decide if a particular product presents an unreasonable risk of injury by, among other factors, considering how many other products need to be regulated first and the resources available to the Commission for issuing standards and bans.

Although the statutory language and legislative history do not expressly invite this type of comparison, the language itself does not necessarily foreclose it. The elements on the injury side of the equation derived from the congressionally suggested balancing test are, in themselves, relative. Thus, the frequency and severity of injuries associated with a product are not meaningful unless a comparison can be made with the expected frequency and severity of injuries related to other products. If we knew, for example, that 50 persons would receive third degree burns annually from using conventional toasters, and the problem could be corrected by means of a feasible standard, we would not know what this information meant without comparing it with other facts. The other facts might be that there were 30 other products causing third degree burns, each to more than 10,000 persons annually, and also correctable by means of a feasible standard.

In addition, because the balancing test is only a suggested means for determining whether an unreasonable risk of injury is presented, it could be argued that factors other

than those suggested by Congress could be legitimately considered. Thus, even if an analysis of the frequency and severity of anticipated injuries does not permit a comparison between different products, the comparison may nevertheless be made in making unreasonable risk determinations because the term, "unreasonable" itself is extremely relative and implies that some risks will be considered "reasonable" when compared with others.

2. Unreasonable Risk Of Injury Determinations Must Be Independent Of Considerations Of CPSC Priorities And Resources.

While Congress did not, as mentioned above, specifically state that the balancing test was to be the exclusive means for determining unreasonable risk of injury, there is no indication, either in the statute or the legislative history, that the Commission may consider its own priorities and limited resources in making the determination, and thus deciding to grant or deny a petition.

It is not necessary to make comparisons among products in deciding whether an unreasonable risk of injury exists because the balancing test can be applied without comparing the frequency and severity of any one alleged unreasonable risk of injury with any other. Thus, without having any statistical information regarding other consumer product-related injuries, it is possible to look at just the problem

presented by one product and determine that it presents an unreasonable risk of injury.

The legislative history which discusses the balancing test reinforces this interpretation, as follows:

> "[a]n unreasonable hazard is clearly one which can be prevented or reduced without affecting the product's utility, cost or availability; or one which the effect on the product's utility, cost, or availability is outweighed by the need to protect the public from the hazard associated with the product." H.R. Rep. No. 1153, 92d Cong., 2d Sess. 33 (1972).

The language in the Senate Commerce Committee Report is similar where it is stated that

> "In those situations where either the degree of anticipated injury or the frequency of such injury can be reduced without affecting the 'performance' or 'availability' of that class of consumer product, then almost any risk capable of producing injury, becomes unwarranted." S. Rep. No. 749, 92d Cong., 2d Sess. 14 (1972).

Therefore, this language clearly indicates that Congress expected only the frequency and severity of the risk of injury from the product under consideration to be evaluated and compared with the effects of regulating that product. Thus, any product could present an unreasonable risk of injury, even if the anticipated risk is relatively minor and the frequency very low, so long as the effect of regulation is minimal. Moreover, if product-by-product

comparisons could be made in considering unreasonable risk, a confusing situation could result; a product that is not considered an unreasonable risk one day could become an unreasonable risk the next day merely because the Commission has acted to reduce the unreasonable risk associated with another product.

B. The Failure Of The Commission To Intitiate A Rule-Making Proceeding Under Section 7 Or 8 Unreasonably Exposes The Petitioner Or Other Consumer To A Risk Of Injury Presented By The Consumer Product.

Section 10(e)(2) of the CPSA provides that the conclusions to be made by the court, based on a preponderence of the evidence standard, before the court may order the Commission to commence a section 7 or 8 rulemaking proceeding, include, in addition to the unreasonable risk of injury finding, the finding that the "failure of the Commission to initiate a rule-making proceeding under section 7 or 8 unreasonably exposes the petitioner or other consumer to a risk of injury presented by the consumer product...." Therefore, assuming that arguments concerning the Commission's limited resources, and the need to address higher priorities first, can play no legitimate role in the determination of the first finding (unreasonable risk of injury) it is nevertheless possible that such arguments are relevant to a

determination of the second. If this is possible, the Commission may take such matters into consideration in denying a petition, and a court, if an action is subsequently brought, may consider them in reaching the second conclusion. Unfortunately, since the Act and the legislative history are silent on this question, it remains a difficult statutory interpretation issue to be ultimately decided by the courts. Two positions that could be taken on this issue follow.

1. Commission Resources And Priorities Are Relevant In A Consideration Of Whether The Commission's Denial Of A Petition Unreasonably Exposes Consumers To A Risk Of Injury.

The second part of the two-fold test of section 10(e)(2) (quoted above) must be examined in conjunction with the first part. If the first part (that the product presents an unreasonable risk of injury) can be established, then it can be argued that the second part (that consumers are unreasonably exposed) is automatically established. However, Congress must have intended this second part of the test to be more than a rephrasing of the first; otherwise the second would be superfluous, a conclusion that is repugnant to accepted standards of statutory construction.[6/]

6/ United States v. Menasche, 348 U.S. 528 (1955); 2A C. SANDS, SUTHERLAND STATUTORY CONSTRUCTION Section 46.06, at 63 (4th Ed. 1973).

If the second part of the test has an independent meaning, even though an unreasonable risk of injury is presented by a product (as determined by weighing such factors as the frequency and severity of anticipated injuries against the practical aspects of regulation, such as the effect of a regulation on the cost, utility, and availability of the product), consumers may not, nevertheless, be unreasonably exposed to the risk of injury through the Commission's failure to take the regulatory action requested. The Commission may have reasonably dealt with the problem in another manner. For example, it might have obtained a recall through the procedures of section 15 of the CPSA. It might have been able to alert consumers as to safe use of the product through an information and education campaign. Voluntary adoption of a standard by industry may have obviated the need for mandatory regulatory action in the area. Also, it is conceivable, given the numerous other unreasonable risks of greater significance that the Commission was attempting to deal with in an ordered, rational manner, it was not unreasonable in a particular instance

for the Commission to deny the petition. If, through any of these arguments, or others not specifically mentioned here, the Commission is able to convince the court that the Commission's failure to institute the proceeding requested by the petitioner did not unreasonably expose consumers to an unreasonable risk of injury, the court should not act to compel the proceeding to be commenced, because the second part of the two-fold test has not been satisfied by the petitioner. Thus, the argument is that the consumer is only unreasonably exposed to an unreasonable risk of injury if the Commission has not acted reasonably given all the circumstances, including its own priorities and lack of resources.

2. Even Though the Phrase, "The Failure Of The Commission to Initiate A Rulemaking Proceeding Under Section 7 or 8 Unreasonably Exposes The Petitioner Or Other Consumers To A Risk Of Injury Presented By The Consumer Product", Does Permit An Inquiry Into The Reasonableness Of The Commission's Refusal To Initiate The Rule-Making Action Requested, The Commission's Priorities And Resource Limitations Have No Place In Such An Inquiry.

While it is true that the second part of the two-fold test must have a meaning beyond merely establishment of the product as presenting an unreasonable risk of injury, it appears difficult to read section 10 in its entirety and be able to say that Commission priorities and resource

capabilities are legitimate factors to consider in meeting the second part of the two-fold test. Priorities and resources could have been relevant considerations if the Act did not include section 10(g), which provides that petitions filed during the three years after the passage of the Act cannot be the basis for a suit under section 10(e). However, every section as well as the entire Act must be read as a whole when interpreting it.[7/] Therefore, the inclusion of subsection 10(g) is indicative of congressional intent that the Commission and the courts not consider the Commission's own priorities and resource limitations after the three year period has elapsed. Since it is undisputed that the purpose of the three year grace period was to permit the Commission to organize,[8/] "properly order its priorities",[9/] and to handle the problems obviously needing attention before it "is beleaguered by everyone's pet peeve",[10/] it can be argued that Congress actually anticipated that the Commission would be beleaguered by pet peeves, but need only react to them after the three year period had

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7/ See citations, note 6.

8/ Remarks of Representative Broyhill, 118 Cong. Rec. H. 9909 (Oct. 13, 1972).

9/ Remarks of Representative Staggers, 118 Cong. Rec. H. 9908-9909 (Oct. 13, 1972).

10/ Note 8.

elapsed. Otherwise, if it can be argued now that the Commission's priorities and resource limitations constitute a part of the considerations under the second part of the two-fold test (or the first part, for that matter), why did Congress need to include subsection 10(g)?[11/]

IV. THE EFFECT COMMISSION PROCEDURAL RULEMAKING COULD HAVE ON ITS ABILITY TO TAKE ITS RESOURCES AND PRIORITIES INTO ACCOUNT WHEN DECIDING PETITIONS

In response to the alleged problem that the petitioning procedures of section 10 of the CPSA create for the Commission in having to expend resources to develop standards for products that rank very low in its priorities, it has been suggested that the Commission might issue regulations to help alleviate the situation. One such suggestion that arose during the February 19 hearing was that the Commission, by regulation, could publish its list of priorities and provide that petitions that address low-ranking problems will be denied because the failure of the Commission to begin rulemaking would not unreasonably expose the petitioner or other consumers to a risk of injury presented by the consumer product (the second part of the two-prong test established in subsection 10(e)(2) of the CPSA and discussed above).

11/ It must be recognized in response to this question that the existence of section 10(g) might be seen as serving a different purpose which would not render it superfluous or otherwise indicative of congressional intent to eliminate resource and priority considerations

(footnote continued next page)

In general it is true that if an agency interprets a statute in a reasonable manner and publishes the interpretation as a rule, courts will be more prone to accept the interpretation so established than they would if the interpretation is made the first time by application to a single case. Administrative agencies' interpretations of statutes under their administration have been accorded great weight by the courts.[12/] Such interpretations have even been held to be binding.[13/] Whereas agency interpretations that have been in existence only a short time and that are inconsistent with prior interpretations are accorded little weight,[14/] long term, consistent interpretations are entitled to great deference.[15/] This is particularly true "when the administrative practice at stake involves a contemporaneous construction of a

(footnote continued)
after the three year period. This purpose would simply be to prevent law suits during that period and, consequently, not to prevent the Commission from arguing that consumers are not unreasonably exposed to risks of injury during the pendency of a law suit because the risks ranked low in the Commission's priorities.

12/ See, e.g., Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972).

13/ Oil Shale Corp. v. Morton, 370 F. Supp. 108 (D. Col. 1973).

14/ See, e.g., Isbrandtsen v. United States, 96 F. Supp. 883 (1951).

15/ See, e.g., United States v. Public Utilities Comm. of Calif., 345 U.S. 295 (1953).

statute by the men charged with the responsibility of setting its machinery in motion; or making the parts work efficiently and smoothly while they are yet untried and new."[16/]

Rulemaking can have an added effect on acceptance by a court of an agency's statutory interpretation. It has been held that publication of an interpretive rule in the Federal Register can give it the dignity of legislation.[17/]

Of course, if the agency's interpretation is clearly erroneous it can be overturned.[18/] Also, where the statute is clear and unambiguous no variance by agency interpretation will be permitted.[19/]

16/ Power Reactor Devel. Co. v. International Union of Electrical, etc. Workers, 367 U.S. 396, 408 (1961).

17/ Thomas v. County Office Committee, 327 F. Supp. 1244 (S.D. Tex. 1971).

18/ Espinoza v. Farah Manufacturing Co., 414 U.S. 86 (1973).

19/ Walling v. Baltimore Steam Packet Co., 144 F.2d 130 (4th Cir. 1944).

In the question presented here, if the phrase from section 10(e)(2), "[t]he failure of the Commission to initiate a rule-making proceeding under section 7 or 8 unreasonably exposes the petitioner or other consumer to a risk of injury presented by the consumer product...", is not clear and unambiguous, and if the Commission's interpretation of the phrase in the regulation is not clearly erroneous, courts should give considerable deference to the interpretation since the CPSA is a new statute being interpreted by the persons who are responsible for seeing that it operates efficiently and smoothly.

As discussed previously regarding this second part of the two-fold test the question of whether Commission priorities and resources can be introduced as factors is certainly arguable and unclear from the statutory language itself. Moreover, the legislative history is not particularly helpful in clarification of this point. Therefore, an interpretive regulation, such as that mentioned above, should be able to withstand judicial scrutiny and should at least permit the Commission, on application, to present resource and priority evidence in contradiction of a petitioner's evidence supporting this part of the test.

As a practical matter, however, it may be very difficult, if at all possible, for the Commission to devise a firm, meaningful priority list for making regulatory decisions even if it could be amended from time to time. And, even if it could be devised, reliance on it in this manner could have an extremely inhibiting effect on the Commission's flexibility to the point where the disadvantages may outweigh the advantages of being able to use priorities as a factor in its decision-making. The only broad statistically valid system presently available from which a meaningful priority list could be devised is the National Electrical Injury Surveillance System (NEISS). While this system does reflect fairly accurately the numbers of product-related injuries treated in hospital emergency rooms, the manner and degree of product involvement in each reported injury is usually not detailed sufficiently to permit making critical value judgments about different products. It is only through in-depth investigations, or upon some more detailed examination of individual cases, that true cause and effect determinations can even begin to be made. Since this type of investigation is very costly and time consuming, only a relatively small number can usually be conducted. Therefore, while a ranking system based on presently available

methods and resources for obtaining information certainly has value in determining priorities, it may not be suitable for making hard and fast regulatory choice decisions, particularly in advance of petitions supplying additional facts.

In lieu of a strict ranking system for making decisions based on the second part of the two-fold test, the Commission could consider a regulation which expresses its interpretation in terms of an articulation of the factors that will be considered in determining the unreasonable exposure of consumers to risks of injury including, among other things, present priorities. The Commission could then, on a case by case basis, try to place the potential for injury in perspective compared with other identified risks and, if a petition is denied because it is relatively low in importance, the facts that were important in deciding this could be stated in the Federal Register notice of denial.

There are probably other ways in which interpretive regulations could be used to mitigate the impact of numerous petitions that place the Commission in an unproductive reactive position. However, these are matters that the Commission may deal with as a matter of policy when experience in administering the Act indicates a need.

V. THE POSSIBLE ROLE OF APPROPRIATIONS LEGISLATION TO AID THE COMMISSION IN PETITION DECISION-MAKING BY PERMITTING IT TO COMMENCE PROCEEDINGS BASED ON ITS PRIORITIES AND RESOURCES.

It has been suggested that Congress "earmark" in the Commission's appropriations act a certain amount of funds for section 7 and 8 proceedings whether initiated by the Commission or on behest of a petitioner who has been successful in establishing the section 10 statutory criteria. The "earmarking" would be accompanied by language which would give the Commission discretion in deciding which proceedings to commence.

This suggested approach is based on the premise that the Commission does not presently have discretion to deny or defer acting on a petition meeting the two-prong criteria of section 10(e)(2) on the basis of limited Commission resources. Thus, it is assumed that either with or without Commission rules as an aid, the language of the CPSA does not permit resources and priorities to enter into a consideration of the relevant factors in section 10(e)(2). Otherwise, this discussion is not necessary.

This approach also assumes that when a petition is granted, the Commission's obligation to "promptly commence an appropriate proceeding", as required in section 10(d), precludes any prolonged delay in doing so.[20/] The approach also distinguishes

20/ The Administrative Procedure Act authorizes a court to "compel agency action unlawfully withheld or unreasonably delayed" (5 U.S.C. 706(1)).

between (1) petitioner's right to petition and have his or her petition acted upon by the Commission (i.e., either granted or denied) and (2) petitioner's right to have the Commission promptly initiate proceedings under section 7 or 8. It is expected that the Commission will have sufficient staff and resources to perform the first function. On the other hand, it is the initiation and conduct of a section 7 or 8 proceeding which places the greater demand on Commission resources in terms of funds and manpower. It is these proceedings over which the Commission has little control (in terms of priority management) once the Commission grants a petition (or is ordered by the court to initiate a proceeding).

A. Advantages of Appropriations Limitation.

The provision under consideration would attempt to allow the Commission to consider the factor of its limited funds in determining whether to commence proceedings for products determined to present an "unreasonable risk of injury". In effect, the Commission could find that a consumer product safety rule is necessary, but because of the nature of the risk in relation to other risks, and the limited amount of funds available, it may decide not to commence proceedings immediately. Instead, it would allocate its "earmarked" funds to those risks which it considered more serious in its priority evaluation.

A limitation on the amount of money the Commission could expend on Section 7 and 8 proceedings arising from petitions would also permit the Commission better management control over its internal operations between programs. With knowledge of the maximum amount of money it has available for section 7 and 8 proceedings arising from petitions, the Commission could allocate its general funds to other priority projects early in the fiscal year instead of holding them in a "contingency fund" for unforeseen petitions.

The funds limitation could be utilized by the Commission, too, as a court defense in those situations where proceedings have not been commenced due to the lack of funds. Absent such a discretionary authority or a limitation on the amount of funds for section 7 and 8 proceedings, the Commission's lack of adequate resources might not excuse it from its statutory obligation.[21/] In Krimm v. Turney, 168 F.2d 72 (1948), for example, an entity of the Department of Commerce argued for dismissal of plaintiff's protest on the grounds of laches and that performance of the administrative function would be unduly burdensome. Although this case involved a charge of "laches" (i.e., delay which would make relief inequitable), and the Commission will not necessarily be faced with the similar problem of petitioners failing to press their claims, the administrative burden argument was rejected by the court which stated,

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21/ See discussion in attached letter of February 25, 1976, to the Senate Subcommittee.

> "It is certainly not true as a general proposition, that an administrative agency has inherent discretionary power to decline to perform a statutory function, where the application for administrative action, though made within the statutory time limit, has been unnecessarily delayed and as a result of the delay the administrative agency now deems the performance of the administrative function to have become unduly burdensome, by reason of reduction of staff or otherwise. Such a discretionary power may, of course, be conferred by legislative act." [Emphasis supplied] 168 F.2d at 73.

Moreover, without an express grant of discretion by Congress, a court could make the assumption that the Commission was adequately funded. For example, the Court in Krimm, supra also said,

> "We have every sympathy with respondent [Director, Division of Liquidation, Department of Commerce] in his administrative problems. But if Congress desires these enforcement actions to be pressed... it must be assumed that Congress will supply respondent with sufficient funds and staff to perform his delegated administrative functions in connection with the special procedure laid down in the Act ...". 168 F.2d at 76.

Therefore, it can be seen that a specific appropriations limitation and grant of discretion could assist the Commission in avoiding an adverse court decision.

Even with an appropriations limitation which grants such discretion, it is not certain that a court would uphold a Commission decision not to initiate a section 7 or 8 proceeding.

However, courts have upheld an appropriation act provision as overriding prior existing legislation providing persons with certain economic benefits. In United States v. Dickerson, 310 U.S. 554 (1940), for example, an appropriation act provision prohibited the payment of reenlistment bonuses to military persons which had been authorized by a prior existing statute. The Court held that the appropriation act language suspended the language of the prior statute for the period of the fiscal year. It would be reasonable to expect a court to rule likewise on a limitation of funds provision in the Commission's appropriation act--deferring to the legislative perogative to change, amend or repeal existing laws and the legislative right to place limitations on the amount and use of funds.[22/]

Further, it is unlikely that a court would order a federal agency to do something which would entail the expenditure of

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22/ Such a provision could amount to a substantive amendment to section 10 because it would authorize deviations from the strict statutory language. For support for the proposition "that Congress can amend substantive legislation by provisions in an appropriation bill ...", see NLRB v. Thompson Products, 141 F.2d 794 at 797 (9th Cir. 1944). See also, Tayloe v. Kjaer, 171 F.2d 343 at 344 (D.C. Cir. 1948), where the Court stated: "Congress, of course, has undoubted power to permanently change existing law even in an appropriation act, and the fact that it is universally recognized as exceedingly bad legislative practice and is forbidden by the rules of both Houses of Congress does not subject it to judicial scrutiny."

funds beyond a Congressional limitation. Such an order would cause the Commission to spend funds not yet appropriated, which is a violation of the Anti-Deficiency Act (31 U.S.C. 665(c)).[23/] Instead, it is conjectured that a court would defer to the legislature's perogative in appropriation matters,[24/] and to an agency's conduct of its operations.[25/]

23/ This situation would be different from those cases where an agency has funds but, for one reason or another, refuses to expend them ("impoundment of funds") for the purpose they were appropriated. See, e.g., People Ex Rel Bakalis v. Weinberger, 368 F. Supp. 721 (1973).

24/ Article I, Section 9 of the Constitution provides that "No Money shall be drawn from the Treasury, but in consequence of Appropriations made by Law ...". As the court observed in Stanton v. Ash, 384 F. Supp. 625 at 632, (1974), "The decision to spend, not to spend, how much to spend, and where to spend is one such issue that, absent very special circumstances, belongs to the legislative and executive branches of government."

25/ In Natural Resources Defense Council v. Train, 510 F.2d 692 (D.C. Cir. 1975), the Court held that EPA had a statutory, "non-discretionary duty" to publish certain guidelines by a certain date. Notwithstanding the statutory duty, the court recognized (page 712) that EPA's budgetary commitments and manpower demands required to complete the guidelines by the statutory date might be "beyond the agency's capacity or would unduly jeopardize the implementation of other essential programs". Accordingly the court said it would not mandate flat deadlines if the Administrator, EPA, could demonstrate that additional time was necessary. The court said, too, "We think the court may foreclose the issuance of an order in those cases where it is convinced by the official involved that he has in good faith employed the utmost diligence in discharging his statutory responsibilities. The sound discretion of an equity court does not embrace enforcement through contempt of a party's duty to comply with an order that calls him 'to do an impossibility'." 510 F.2d 692 at 713.

B. Disadvantages of Appropriations Limitation.

Although an appropriations limitation may provide the Commission with certain discretionary powers not previously possessed, and although such a limitation could be upheld on judicial review, a limitation on the amount of funds available for proceedings arising from section 10 petitions would have certain disadvantages that require consideration.

1. The Limitation Will Possibly Deprive Some Citizens Of Their Right To Have A Proceeding Commenced For A Consumer Product Safety Rule.

Section 10(e)(2) sets forth a two-fold criteria for judicial review of a Commission denial of a petition or failure to act on a petition within 120 days. If a court finds that the consumer product in question presents an unreasonable risk of injury and that the failure of the Commission to initiate section 7 or 8 proceedings "unreasonable exposes the petitioner or other consumer to a risk of injury presented by the consumer product", it will order the Commission to initiate the action requested by the petitioner. Thus, it can be argued that a petitioner who can demonstrate that both criteria are met is entitled to Commission action, according to the strict language of the statute, notwithstanding the Commission's limited resources.

The Commission's failure to commence proceedings for an "unreasonable risk of injury" may invite criticism of arbitrariness.

Likewise, it does not appear to accord with the legislative history of section 10 which unconditionally affords all persons the right to have a proceeding commenced once they meet the section 10 criteria. To deprive persons of this right only because of lack of funds could be looked upon as a "breach of faith" on the part of Congress. The argument can be made that if Congress thought it important to give citizens the statutory right to petition the Commission in connection with risks of injuries and, moreover, to establish judicial review of Commission denials, the Congress should be expected to fully fund Commission expenses in connection with the proceedings arising from granted petitions. Otherwise, it could appear that Congress "gives with the right hand, and takes away with the left."

2. The Refusal Of The Commission To "Promptly Initiate Proceedings" Would Invite Litigation.

If the Commission fails to initiate proceedings for those petitions which are granted it can be expected that some frustrated petitioners may bring suit to have the proceedings initiated. It is difficult to predict whether a court would decline to order commencement of a section 7 or 8 proceeding on the basis of insufficient Congressional funding.[26/]

26/ A petitioner could try to have a district court order the Commission to initiate proceedings. But this would

(footnote continued next page)

It might be argued that section 10 gives citizens an absolute right to petition the Commission and the Commission cannot fail to initiate a proceeding solely on the basis of limited funds. The Courts have, in a number of cases, held that lack of funds by a governmental entity cannot be a reason for depriving individuals of their constitutional rights.[27/] Too, a court might rule such a limitation is invalid on the basis that it would deprive some persons of their statutory right under section 10--and that such unequal treatment deprives the petitioners of "due process."

(footnote continued)
likely be a general mandamus action under 28 U.S.C. 1361 rather than a section 10(e) action because the prerequisite of a section 10(e) action is that either the Commission has denied a petition or has failed to respond to the petition within 120 days.

27/ Wyatt v. Aderholt, 503 F.2d 1305 (1974) (mental patients committed to state mental institutions have a Constitutional right to treatment not withstanding state's claim of insufficient funds; Hamilton v. Love, 328 F. Supp. 1182, (E.D. Ark., 1972); Holt v. Sarver, 309 F. Supp. 362, (E.D. Ark., 1970), affirmed 442 F.2d 304 (1971); Jackson v. Bishop, 404 F.2d 571 (1968).

3. The Limitation May Be Undesirable, Too, Because It Would Restrict The Commission's Managerial Perogatives In Reallocating Funds.

Presently, the Commission may reallocate its appropriated funds from program to program as priorities may change.[29/] However, when Congress appropriates funds to be used for a specific purpose, the specific appropriation precludes the use of general appropriations, even after exhaustion of the specific appropriation.[30/] Likewise, a limitation on the amount of money to be expended on a certain program would preclude the transfer of additional funds to the program from the Commission's general fund, even if such funds were available. (Congress could, conceivably, provide that funds could be transferred from the general appropriation to regulatory development arising from section 10 petitions if the limitation were reached, but that would defeat the purpose of the limitation.)

D. Summary Regarding Appropriations.

In summary, the advantages of an appropriation limitation on the amount of funds available for proceedings arising out of section 10 petitions appear to be outweighed by the disadvantages. It appears the "trade-off" for the greater planning

29/ Subject to OMB Regulations and Circulars.

30/ 1 Comp. Gen. 312 (1921); 20 Comp. Gen. 73 (1941); 34 Comp. Gen. 236 (1954).

capability provided by an appropriation limitation for petitioners arising from section 10 petitions is the loss of management's ability to reallocate funds where they are needed--as well as placing the Commission in the unenviable position of having to deny section 10 petitions solely because of limited funds. Commission success in litigating the implementation of section 10 may be outweighed by adverse publicity to the Commission.

U.S. CONSUMER PRODUCT SAFETY COMMISSION
WASHINGTON, D.C. 20207

FEB 25 1976

Honorable William Proxmire
Chairman
Subcommittee on HUD-Independent Agencies
Committee on Appropriations
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This letter is in response to your request, during the Consumer Product Safety Commission's FY 1977 appropriations hearing on February 18, for a written opinion concerning the success of using differing priorities, caused by resource or personnel limitations, as a defense against court actions seeking affirmative agency actions, such as those involved in section 10 of the Consumer Product Safety Act (CPSA), (15 U.S.C. 2059). In my opinion such an approach is rational since it recognizes that the Commission has finite resources. However, while the Commission may very well find it necessary at some time in the future to make decisions on this basis, it appears, in view of the statutory language involved, that it would be difficult to convince the courts not to order the commencement of a rulemaking proceeding after a petitioner has met his or her statutory burden.

While there are, as of this time, no cases arising directly under the relevant provisions of section 10 of the Consumer Product Safety Act, I have examined several decisions of federal courts which were asked to order governmental entities or agencies to take some affirmative action. While some of these cases do involve the constitutional rights of individuals, as opposed to purely statutory obligations of agencies, I believe they are analogous in that the courts are being asked to order the government to perform tasks that are difficult for practical reasons.

The cases I have examined, while not exhaustive of the subject, are summarized below, and generally tend to show a judicial leaning towards the ordering of affirmative agency actions.

1. Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974). Notwithstanding arguments that the correction of deficiencies in the state's mental institutions would require a heavy expenditure of funds, that such funds would have to come from other programs, and that the duty of allocating state funds was solely the responsibility of the governor and legislature, the Court found that the state could be ordered to correct the deficiencies.

2. Mills v. Board of Education of the District of Columbia, 348 F. Supp. 866 (D.D.C. 1972). Here, the duty to provide a publicly-supported education for exceptional children, based on the Constitution of the United States, the District of Columbia Code, and the District's regulations, was found sufficient to justify an order requiring implementation of an extensive program, even though it was claimed that there were insufficient funds.

3. Campbell v. McGruder, Civil No. 1462-71 (D.D.C. Nov. 5, 1975). In this case, although defendants argued that they lacked control over the conditions prevalent in the D.C. Jail, the Court ordered detailed remedial actions because of the prisoners' rights.

4. Pugh v. Locke, Civil No. 74-57-N (M.D. Ala. Jan. 13, 1976). The Court issued an extensive order requiring the correction of deficiencies in several state prisons. The defendant admitted in open court that it had been conclusively established that the plaintiff's Eighth Amendment rights had been violated. The argument of defendant was that the conditions in the prisons could not be alleviated because of inadequate funding by the state legislature.

5. Natural Resources Defense Council v. Train, 510 F.2d 692 (D.C. Cir. 1975). In this case the Court, in declining to fully uphold the Order of the District Court relating to the publication of certain water pollution guidelines by EPA, recognized that because of agency budgetary commitments and manpower demands it would either be impossible for the agency to comply by December 31, 1974, or that compliance would unduly

jeopardize other essential programs. Therefore, the Court found that EPA could petition for a stay of the order requiring publication by that date under certain circumstances. However, although the decision in this EPA case recognized the problems of agency resources, it did not stand for the proposition that the agency may disregard its statutory duty for an indeterminable period of time because it had more important tasks before it and a limited amount of resources.

6. Tuchinsky v. CPSC, Civil No. 219-73 (D.D.C. Nov. 14, 1974). The plaintiff was seeking a court order to affirmatively require CPSC to issue certain regulations pertaining to the toy amendments to the Federal Hazardous Substances Act. CPSC argued, among other things, that it was congressionally mandated to order its priorities on the basis of the danger presented to the consumers, and not on the basis of the chronological order in which various pieces of consumer legislation had been enacted. The argument was that the CPSA specifically provided that the priorities of the Commission would not be set by outside parties during the first years of its existence and that the statutory directive to address the problems of product safety in a comprehensive fashion could only be carried out by addressing the most important hazards first. Although this case did not involve a petition under section 10 of the CPSA, but was an action to compel the initiation of rulemaking under one of the Commission's transferred acts, I think it is important to note that the Court, without discussing the Commission's priority arguments, denied its motion to dismiss and ruled that CPSC had a duty to issue the regulations, where possible.

None of these cases can be considered determinative in a law suit arising under section 10 of the CPSA. They are merely indicative of trends in judicial thinking. However, the express language of section 10 itself, as well as its legislative history, leads me to doubt the liklihood of success of a priority-ordering or lack-of-resources argument standing alone. Subsection 10(e) of the Consumer Product Safety Act allows a petitioner to obtain a court order requiring the Commission to begin a rulemaking proceeding concerning a consumer product. For a court to issue such an order, the petitioner must convince the court, by a preponderance of the evidence, that the product presents an unreasonable risk of injury and that failure of the Commission to commence rulemaking unreasonably exposes consumers to a risk of injury presented by that consumer product. Therefore, from

the express language of the law, at least, the petitioner would be entitled to the relief requested upon meeting the statutory burden.

Neither section 10 nor the legislative history of this section mentions the availability of resources or the Commission's priorities as factors which might enter into the court's decision to order the initiation of a rulemaking once the petitioner has met the statutory burden. In fact, the CPSA in subsection 10(g) gave the Commission a three-year grace period before petitioners were given the ability to sue to force the commencement of rulemaking. The legislative history of subsection 10(g) indicates that the three years were necessary to enable the Commission to "properly order its priorities." (Remarks of Representative Harley Staggers, 118 Cong. Rec. H 9908-9909 (Oct. 13, 1973).) Further, the Congress believed that "[a] new entity such as the Commission must first of all get organized...." (Remarks of Representative Broyhill, 118 Cong. Rec. H 9909 (Oct. 13, 1972).)

In view of the analogous cases cited, the express statutory language, and the legislative history, now that the three-year grace period has elapsed, a plea that the Commission cannot act on an unreasonable risk because it has different priorities may be viewed by the courts very critically. Thus, it would seem difficult for the Commission to convince a court to either disregard or read something extra into the section 10 procedures.

Sincerely,

Original signed by
Michael A. Brown

Michael A. Brown
General Counsel

FIREWORKS RULEMAKING

Mr. BROWN. Chairman Simpson, this Commission and its predecessor, the Food and Drug Administration, have been considering for approximately 3 years the fireworks rulemaking. The rulemaking has not been concluded, and the Commission has been considering the presiding officer's report and the briefs of the parties for well over 6 months. When is that rule to be promulgated?

Mr. SIMPSON. As a matter of fact this morning we were able to reach a majority on the opinion and tentative order, and it should go to the Federal Register very soon.

RECORDKEEPING RULEMAKING

Mr. BROWN. In another rulemaking that was started about a year and a half ago, the recordkeeping rules under section 16(b) were proposed for comment in the fall of 1974, and that comment period was closed before Thanksgiving of that year. What is the status of that rulemaking?

Mr. SIMPSON. That went out and was so controversial, the number of comments we received were so voluminous, I think the feeling is to repropose it.

Mr. PARENT. We are in the process of analyzing the massive number of comments that came in on it.

TIME FOR DECISION BY COMMISSION

Mr. BROWN. What is the average time for Commissioners to make a decision on a rulemaking, that is, the average time from the date the proceeding is submitted to you, is on your desk, until the day you vote?

Mr. SIMPSON. I don't have statistics, but I think the average is probably less than 2 weeks. The average would be less than 2 weeks.

I can tell you what we do. When a briefing package—whether it is on a rule, policy, anything that takes a Commission vote—comes to the Commission it is scheduled on an executive session for a vote on the week following its arrival on the Commission's desk. Most of the items are normally voted on and disposed of that following week.

We do have a provision for particularly complicated regulations and rules to defer for another week, and then they are usually voted on.

The sessions you have talked about, I think the fireworks regulation is one of those. Frankly, we were split right down the middle on that regulation. I think we were at the outset and further split by the ruling from the administrative law judge. It is not a simple issue, and we were able this morning, hopefully before Commissioner Newman leaves, for she is part of the majority that enables us to arrive at a decision, to resolve our differences.

Mr. BROWN. Could you submit for the record statistics on the average time for decisions during the last year?

Mr. SIMPSON. Sure. I think it will end up between 1 week and 2 weeks.

[The following information was received for the record:]

Average Time for Decisions by the

Consumer Product Safety Commission

Prepared for the Subcommittee on Oversight and

Investigations, House Committee on Interstate and Foreign Commerce,

March, 1976

As shown on the attached tables, the Consumer Product Safety Commission makes the overwhelming majority of its decisions within one week after an item appears for vote on the agenda for the Commission's weekly Executive Sessions. It is Commission practice to list on the agenda all matters submitted to the Commission at the time of submission; thus, appearance of an item on the agenda is synonymous with receipt by the Commissioners.

Of 683 decisions which the Commission decided and/or initiated in Calendar Year 1975, 78 per cent were made within one week, 85 per cent within two weeks, 89 per cent within three weeks and 94 per cent within four weeks.

Total Decisions	1 week	2 weeks	3 weeks	4 weeks	More than 4 weeks
683	535	45	27	38	39
100%	78%	7%	4%	5%	6%

In making these tabulations, we have used the agendas prepared for the meetings, and cross-checked them with memoranda prepared by the Secretary after each meeting, which list decisions and necessary follow-up for each decision. A decision listed under the 1 week column appeared on only one agenda; those listed under 2 weeks appeared on two, and so forth. However, prior to October 30, 1975, items for each agenda were submitted up to the Tuesday immediately before the Thursday Executive Session. Thus, some decisions were made after briefing material on the issue had been in Commissioners' hands for somewhat less than one week. After October 30, the schedule was changed, and all but emergency items are now submitted to the Commissioners at least one full week prior to the Executive Session. In many cases, of course, similar items appear on a number of agendas. Where possible, we have accounted in the footnotes to the accompanying chart for actions by the Commission which were not final decisions on a matter, but were votes which disposed of specific items by returning them to the staff for additional information or further revision.

It is important to note that it is the Commission's policy to decide matters by majority vote of the five Commissioners, not by a majority vote of a quorum (3) at any given meeting.

As noted above, the decisions counted in these tabulations are those which were initiated and/or acted upon in Calendar Year 1975. Thus, some of the decisions are on items added to the agenda in late 1974 and acted on in early 1975; others are items added to the agenda in 1975 and decided early in 1976 (up through the March 4, 1976 Executive Session).

We have defined the types of decisions delineated in the tabulation somewhat arbitrarily, since few decisions affect only one category of action. For the purpose of this tabulation, we have defined the following categories.

Proposed Rules: Actions related to proposed rules and statements of policy include approving Federal Register documents on the proposals, extending comment periods, and withdrawing proposals. This category does not include rules proposed under section 7 proceedings (see below), or decisions to grant petitions seeking exemption from special packaging requirements of the PPPA (an action which triggers a proposed amendment of the packaging regulations); these actions are counted under the petition category (see below).

Final Rules: Generally, these actions are limited to approving Federal Register documents promulgating a final regulation.

Section 7 Matters: Actions taken under this category include approval of "section 7 notices" initiating rule-making proceedings, votes to select "offerors," votes to extend development or evaluation time of recommended or proposed standards, and votes on proposed or final rules which were initiated under this section. As explained below, this category specifically excludes Commission action in granting petitions under section 10 of the CPSA, even though this action initiates section 7 proceedings.

Petitions: Under this category, we have listed primarily decisions to grant or deny a petition under one of the Commission's Acts. However, the category also includes decisions to approve Federal Register documents, letters to petitioners, and majority opinions which may be required to implement decisions on petitions. As noted above, this category includes actions on petitions under section 10 up to the point immediately before section 7 proceedings are initiated.

Enforcement Matters: This category includes decisions to seek civil or criminal penalties for alleged violation of CPSC Acts or regulations; decisions to close cases or accept consent agreements; and decisions on motions and orders which relate to enforcement proceedings. The category specifically excludes actions taken under section 15 of the CPSA (see below).

Section 15 Matters: Actions related to section 15 of the CPSA, and listed under this category, include the opening and closing of cases involving products which could cause a substantial risk of injury; accepting negotiated consent agreements or voluntary corrective action plans; and initiating adjudicative proceedings under section 15(f).

Appeals of Court Decisions: This category is self-explanatory.

Comments on Legislation: These decisions are votes on draft letters responding to requests for Commission views on proposed legislation, generally from the Congress, but in some cases from the Office of Management and Budget.

Freedom of Information Matters: Decisions under this category include votes on appeals of the Secretary's denial of FOIA requests, and on the Commission's FOIA policies.

Miscellaneous Actions: Included in this category are actions on advisory opinions, jurisdictional questions, selection of advisory committee members, approval of meetings, and approval of Federal Register notices, letters and the like, which do not fit under other categories.

Attachments

Average Time for Commission Decisions page 4

Type of Decision (and number)	Time for Action: 1 week	2 weeks	3 weeks	4 weeks	More than 4 weeks
Proposed Rules (18)	12 66%	3 17%	--	--	3 [1] 17%
Final Rules (10)	7 70%	1 10%	--	--	2 [2] 20%
Section 7 Matters (45)	39 86%	1 2%	2 [3] 4%	--	4 [4] 8%
Petitions (56)	43 77%	12 21%	--	--	1 [5] 2%
Enforcement Matters (358)	280 78%	8 2%	6 [6] 2%	36 [7] 10%	28 [8] 8%
Section 15 Matters (66)	45 68%	3 5%	18 [9] 27%	--	--
Appeals of Court Decisions(3)	2 67%	1 33%	--	--	--
Comments on Legislation (40)	36 90%	3 8%	1 [10] 2%	--	--
Freedom of Information Matters (8)	6 75%	2 25%	--	--	--
Miscellaneous Actions (79)	66 84%	11 14%	--	1 [11] 1%	1 [12] 1%

Footnotes

1/ Policy on petitions first on agenda September 25, 1975; decision that week to request staff comments. Back on agenda October 23; decided November 17.

Policy on imports first appeared on agenda May 1, 1975; decision that week to seek additional comments from staff and individual Commissioners. Revised Federal Register notice back on agenda September 25; decided that week.

Vacuum bottles proposed regulation first appeared on agenda October 9, 1975; Commission sought additional information. Back on agenda January 15, 1976; decided that week.

2/ Final meeting policy on agenda 6 weeks. "Fireworks" on agenda August 7, 1975; decision on tentative Order of the Commission made February 20, 1976; decisions were made on various motions and orders in the interim.

3/ One of these decisions was to initiate section 7 proceedings on Christmas tree light sets, originally on agenda as a section 15 matter (see note 9 below).

4/ Recommended swimming pool slide standard submitted by offeror May 30, 1975; Commission voted to propose standard July 31. Decision to publish final swimming pool standard (promulgation) made December 23, 1975, 5 weeks after issue first appeared on agenda. Decision on bookmatch standard made 5 weeks after issue first appeared on agenda. However, an interim decision was made to seek additional information from staff, and final decision was made 4 weeks after this information was transmitted.

Decision on proposed architectural glazing standard first appeared on the March 13, 1975 agenda. Following a briefing by staff in April, the item appeared on the May 30 agenda, when the Commission returned the draft to the staff for additional work. It appeared on the agenda again for the November 6 and 13 meetings (no meeting held November 6), and again was returned to staff for additional work. On January 15, 1976, the issue again appeared on the agenda, and that week was approved for proposal.

5/ Final opinion on NRDC aerosol petition approved in August, 1975. Petition first appeared on agenda March 28, and Commission asked for a meeting between staff and industry representatives, which was held in May.

The petition was on the agenda again June 12, and was discussed in a series of special sessions soon afterward.

6/ Five cases decided together.

7/ Seventeen Flammable Fabrics Act cases decided together. Nineteen toy cases decided together.

8/ Twenty-eight mattress flammability cases decided together.

9/ Eight Christmas tree lights decided together in one vote; nine decided in another.

10/ Comment on H.R. 3495 (aerosol can safety).

Footnotes

11/ Advisory opinion on jurisdiction over traffic light devices.

12/ Decision on procedures on staff attendance at closed, non-substantial meetings. Decision was made same week as decision on final meetings policy)see note 2, page 5).

Mr. BROWN. Mr. Chairman, I believe Commissioner Franklin has a comment.

Mrs. FRANKLIN. Lest the record be unclear with respect to fireworks, that lengthy delay you were talking about of several years, appeals and so on, that is not, in my opinion, because the Commission couldn't act fast enough, it is because of section 701(e) of the Food, Drug, and Cosmetics Act under which this takes place. In my opinion that is one of the most unwieldy processes ever seen, and I think should be amended.

Mr. BROWN. I know in this rulemaking a hearing was granted, but in another Commission proceeding under the same statutory authority, the *Pactra* case, a hearing was denied. Was it necessary for the Commission to grant a hearing in the fireworks matter?

Mr. MICHAEL BROWN. In *Pactra* in the ninth circuit, the Commission was ordered——

Mr. BROWN. I understand that.

"SUMMARY JUDGMENT" RULES FOR DETERMINING WHEN TO GRANT A HEARING

Does the Commission have any rules for guidance in ruling on those requests for a 701(e) hearing under the Hazardous Substance Act?

Mr. SIMPSON. We have a legal memo from General Counsel, if reasonable grounds have been submitted, I think that section 701 is fairly clear on that, if reasonable grounds are submitted and if the grounds were proved to be true in a trial proceeding, then you must go forward with the process.

There were, in this one, two constitutional issues raised—freedom of religion, and one other.

Mr. BROWN. I understand that, but the Food and Drug Administration, for example, which uses this statute, promulgated what they call summary judgment rules for ruling on these requests for hearings. Has the Commission considered any such rules?

Mr. MICHAEL BROWN. In ruling on the *Pactra* rule, we inherited the Food and Drug procedures, so we were using their rules. They had the only cases in existence under 701(e).

Mr. BROWN. Have you adopted those rules?

Mr. MICHAEL BROWN. No; they become ours until we change them.

Mr. BROWN. Those are your rules?

Mr. MICHAEL BROWN. Under section 30 those are our rules.

Mr. BROWN. That authority was not available in the fireworks matter?

Mr. MICHAEL BROWN. Again using that, a determination of the Commission was that there were reasonable grounds. Some of the cases are supportive where reasonable grounds were raised. In this one the freedom of religion issue was raised.

Mr. PITTLE. I have a comment about the length of time. This proceeding was undertaken pursuant to section 701(e). Had the Commission decided that fireworks were articles intended for use by children, we could have gone under the child protection section of that act and utilized the informal rulemaking procedures of section 553 of the APA and that would have been considerably shortened. If there were constitutional issues, they could have been in the courts by now.

REGULATION OF PRODUCTS INTENDED FOR USE BY CHILDREN

You brought the question up before about the Hazardous Substances Act. It is not what I would call a perfect act. But in cases where it involves hazards to children resulting from toys and other articles for use by children, the Hazardous Substances Act provides this Commission authority to ban a product children would use very quickly. A ban could be imposed after notice and comment for 30 days. I believe the protection is much faster and fuller for kids' articles.

Mr. BROWN. Has the Commission adopted a policy as to when it will use the Child Protection and Toy Safety Act?

Mr. PITTLE. I will send a statement on this subject for the record.[1]

Mr. SIMPSON. I think you will only get a statement of policy when we can get the majority statement from the Commission.

ASSESSING ENVIRONMENTAL CONSEQUENCES OF CPSC REGULATION

Mr. BROWN. The effective date of the Commission's repurchase and disposal order in the *Pactra* case was delayed almost a year because of the Commission's failure to assess the environmental aspects of the order. Why was that?

Mr. SIMPSON. It was simply a mistake.

Mr. BROWN. Are you considering the adoption of rules, for example, that would guide the Commission?

Mr. SIMPSON. The assignment has been made to the Bureau of Economic Analysis to make an environmental assessment in every instance in which it is required.

Mr. BROWN. How do you determine when it is required?

Mr. SIMPSON. Under the guidelines of NEPA.

Mr. BROWN. Does the agency have guidelines for its own specific kinds of actions?

I might say this. The Food and Drug Administration has guidelines on when environmental assessments are to be made in 21 CFR part 6.

Mr. SIMPSON. We don't have any formal ones.

Mr. MICHAEL BROWN. Such guidelines have been in the making between a contractor laboratory and the Bureau of Economic Analysis.

If you are talking about overall provisions for the Commission, one of the models we have considered for guidance has been the procedures of the Food and Drug Administration.

Mr. BROWN. I think that has been useful.

Mr. SIMPSON. I think, Mr. Brown, if you look around the Federal Government you would find many cases like *Pactra*.

Mr. BROWN. I have no doubt about that.

I note in 21 CFR 6.1(b) that this specific kind of proceeding was enumerated as one where the Food and Drug Administration would have required an assessment; so there is no question that while other agencies may be getting hung up on failure to make assessments, there are obviously kinds of cases where environmental assessments clearly are to be made, and the rules can serve as a useful guide.

Thank you.

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[1] Commissioner Pittle's proposed statement of policy appears in appendix E, p. 305; a more complete statement of his views on the applicability of the Child Protection and Toy Safety Act appears in his dissenting opinion reprinted as Appendix J, p. 381.

Mr. MAGUIRE. I have one more question and then will yield to the gentleman from Texas.

EFFECTIVENESS OF SECTION 15 OF CONSUMER PRODUCT SAFETY ACT

On page 4 of your statement, Mr. Simpson, you talk about section 15, and the fact that 350 reports have been acted upon to date involving 24 million items and corrections on 4 million of those items. Others have expressed the view that a surprisingly small number of notifications have been received under this section, raising some question about actually how vigorous you have been, and how seriously you have taken this section.

On page 2 you talk about how there are 10 million firms involved, and 20 million products with associated injuries per year. I just wondered, given the data you have given us on the total universe, plus the data you have given on how many applications under section 15, how you can be optimistic or feel that that is an accomplishment of any particular dimension to have that number of reports?

Mr. SIMPSON. I don't know, nor do I know anyone who knows how many products in the marketplace have substantial product hazards.

Mr. MAGUIRE. We note there are 20 million product-associated injuries. You have no idea how many injuries were directly product related?

Mr. SIMPSON. I think there was testimony and most people estimated that at between 15 and 25 percent. Yesterday, and Mr. Brown may recall, in the budget hearing of Mr. Proxmire's committee he called to my attention an estimate made by Mr. Whittaker, of Underwriter Labs, that the underlying causes were responsible for about 5 percent of the total.

Mr. MAGUIRE. 350 reports from 10 million firms in a 3-year period. is that what we should expect to get?

Mr. SIMPSON. I don't know. I think it has been adequate. We tried to follow up and have not found anybody in our investigations that is violating the 15(b) reporting provision.

We have had a policy, and we have tried to flesh this out, again with a limited staff, sending out letters we hope would scare someone into reporting, and we call them a pre-15(b) letter, that is where we have unverified data that a product may have such a defect. We send out a letter and say, "Hey, are you aware of our provisions?"

ABOLISHMENT OF COMMISSION

Mr. MAGUIRE. At this early stage of the Commission's existence, relative to the whole universe we are concerned about, I am astonished to find latent in your statement that the Commission might go out of business, or be abolished. I don't know how we will get to that. Even if we get to that point, given technical change, how could there be a point where you would want to move to abolish the Commission?

Would you comment?

Mr. SIMPSON. Yes. It would be a long comment, but most questions could be answered by a reading of the 200-page report we sent up for the 1977 budget estimate. It takes into account generic standards that address products before coming into the marketplace, an example would be the way you treat toys by a set of generic standards.

Mr. PITTLE. I do share the opinion of the Commissioner that unnecessary Government regulation should be stopped. As to abolishing CPSC, I don't think it will be as easy as he alleges. I don't think it should be.

If we take the outside estimate of 5 million injuries being caused by the product itself—that is an estimate that our staffs have worked up on their own—what about the 75 percent that the chairman believes no standard can reduce? What about the other three-fourths of 20 million that need to be addressed?

A lot of those injuries involve consumer behavior, and I think that requires a lot of consumer education. A lot of information to consumers about these hazards. That is one area we really have to amplify, that we never get into. As Commissioner Kushner pointed out in a previous hearing, we are never asked, What are you doing about consumer behavior to help them know how to operate more safely with products? We are never asked that question. If we are, it is a gratuitous question.

As for products under standards, it is still likely that due to bad quality control, a hazardous product may get into the marketplace. There still will be the need for this agency to flush those out and have them recalled.

Moreover, you have to have people enforce compliance, and inspectors to make sure producers are living up to the regulations.

As another example, the electric stun gun or Taser popped out of nowhere, and this agency is probably the only agency with expertise to evaluate it on a technical basis.

Mr. MAGUIRE. Commissioner Franklin?

Mrs. FRANKLIN. With respect to your question about the abolition of the agency, I would like to say this. I disagree with the premise that after we have promulgated 100 mandatory safety standards over a period of 5 years, we should self-destruct. I disagree on a couple of counts.

One, as Dr. Pittle and Dr. Kushner both pointed out, there are a number of other tools we have with which to attack the problem of how to reduce injuries, other than the mandatory safety standards. I think voluntary action on the part of industry and consumers, consumer education, and a variety of other things need to be more effectively used.

I disagree also because I think there is going to be a need for some kind of look at the marketplace from the Federal vantage point. It would be great if the need disappeared, but I don't see it disappearing overnight.

I think there is merit, however, in our agency being required to look at itself every few years to see what kind of results there have been because of our work. How much have injuries been decreased? Is the marketplace in fact getting safer?

If so, maybe the configuration and activities of this agency would need to change. The review process is one that needs to happen.

Mr. MAGUIRE. The gentleman from Texas is recognized for 5 minutes.

ALLOCATION OF SUBCOMMITTEE STAFF TO MINORITY

Mr. COLLINS. I would like to put in this record a protest from the minority about the way this committee operates. It is difficult for

us on the minority side to have much input or know what is going on because in this liberal Congress; the concept of bringing freedom and justice to all we have seen a completely rewritten book of rules. The minority raised this objection earlier in one of the hearings, but since we have not made any progress, I want to put it back on the record.

Our committee staff is directly under the chairman who selects 35 members of our staff subject to the approval of the majority. The minority has no input as to who is on the staff. If a Member of Congress who is a member of this committee wants to see project research information, he has the right to see it himself, but no member of his office staff has the right to go in and see that raw material, only the Congressman.

We are entitled to have two people on our minority staff; we have a lawyer and an assistant. I cannot send my lawyer in to see the raw material. There is no way he is entitled to see it, nor can I take photostats to take back to him to evaluate this information.

What I object to strongly is the fact that when we get to the 5-minute rule, counsel has 22 minutes, and we live under the 5-minute rule. It is all at the discretion of the Chair, but we go entirely by the book.

Although the minority makes up one-third of the Congress, we have relatively very little input on this, and I think this oversight is tremendously important. I don't object to the fact we are not going by the rules; I am objecting to the fact the rules are written with a stacked deck.

Is my 5 minutes up?

Mr. MAGUIRE. Thank you, Mr. Collins.

On behalf of the Chair and committee, I want to say we follow the rules of the House as determined by the majority.

I want to leave the record open at this point for staff questions and exhibits.

[Further questions addressed by the subcommittee to the Commission and the responses thereto follow:]

Written Questions Submitted to the Commission Subsequent to the Hearing and Commission Responses

CONGRESS OF THE UNITED STATES
HOUSE OF REPRESENTATIVES
SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS
OF THE
COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE
WASHINGTON, D.C. 20515

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MICHAEL R. LEMOV
CHIEF COUNSEL

J. THOMAS GREENE
COUNSEL TO THE CHAIRMAN

March 3, 1976

Honorable Richard O. Simpson
Chairman
Consumer Product Safety Commission
Washington, D. C. 20207

Dear Mr. Chairman:

In order that the record of the Consumer Product Safety Commission Oversight Hearings of January 30 and February 19, 1976, may be complete, please furnish the Subcommittee with answers to the following questions:

1) Much thought is being given by this Subcommittee and others currently considering government regulation to the question of how greater agency independence can be achieved. You spoke in your opening statement of the need for greater accountability. Do you believe that accountability and independence are, to a large degree, mutually exclusive?

2) You also mentioned in your opening statement that you favor a single-administrator agency over a collegial agency. Will you explain exactly why?

3) Section 27(k)(1) of the Consumer Product Safety Act requires the Commission to transmit concurrently to the Congress any budget estimate or request it submits to the President or OMB.

a) Do you think this provision has enhanced the agency's independence?

b) What effect has this provision had on the agency's ability to secure the funding it believes is necessary?

4) It appears that there may be a conflict between section 27(k) of the Consumer Product Safety Act and 31 U.S.C. 15 (as implemented by OMB Circular A-10) with regard to the appropriate position for you to take when the budget proposed by CPSC differs from that proposed by the President. In a letter to you dated

January 29, 1976, which I inserted into the Congressional Record of February 11, 1976 (page E608), OMB Deputy Director Paul H. O'Neill stated:

> The President expects each official in the Commission to support actively the budget amounts set forth in this letter and its enclosures. This support should be given in testimony before congressional committees, in informal contacts with members of Congress and their staffs, and in speeches and meetings with outside groups.

a) Has the Commission adhered to that instruction from OMB?

b) What effect do section 27(k) and the Commission's status as an "independent" agency (section 4(a) of the Consumer Product Safety Act) have on the Commission's obligations under 31 U.S.C. 15 and OMB Circular A-10?

5) The Commission's General Counsel has construed section 4(f) of the Consumer Product Safety Act as giving the Commission Chairman exclusive authority as to budget matters.

a) Why is the budget not a general policy matter within the meaning of section 4(f)(2) of the CPSA which provides that "the Chairman shall be governed by general policies of the Commission . . . ."?

b) Exactly what role have the other Commissioners played in the budget process to date?

6) In declining to prosecute a number of your agency's criminal referrals, the Department of Justice has criticized CPSC referrals for several reasons:

a) Too much time has passed between the date of the alleged offense and the date of referral to the Department of Justice.

b) The facts of the case do not have sufficient appeal to obtain a jury verdict. For example, the hazard may not appear severe (one case in which the prosecution was declined involved lacerations caused by a pipe cleaner), or the violation of law alleged may be de minimus (one case involved slats in a baby crib deviating only a few thousandths of an inch from the prescribed separation).

c) The violator has subsequently brought his practices into compliance with the Act.

d) Improper CPSC investigative techniques were employed. In one case, the Department of Justice indicated that the CPSC investigator may have illegally entrapped a potential defendant.

e) The referral package was improperly prepared.

Are these criticisms by the Department of Justice justified? If so, what specific steps is the CPSC taking to alleviate these problems?

7) The Commission's answer to question 12 of the Subcommittee's questionnaire which was sent last summer, pertaining to prior employment of agency personnel, stated as follows:

> To the best of my knowledge, no CPSC commissioners or GS-15 or higher employees have come directly or indirectly from employment in or compensation by the industries regulated by or subject to our jurisdiction.

Is this still an accurate statement? If not, please furnish the name, current position, and prior employment of each GS-15 or higher employee who has come directly or indirectly from regulated industries.

8) Section 4(g)(2) of the Consumer Product Safety Act provides in part:

> No full-time officer or employee of the Commission who was at any time during the 12 months preceding the termination of his employment with the Commission compensated at a rate in excess of the annual rate of basic pay in effect for grade GS-14 of the General Schedule, shall accept employment or compensation from any manufacturer subject to this Act, for a period of 12 months after terminating employment with the Commission.

a) Have there been any violations of this provision to date?

b) The Commission's response to question 14 of the questionnaire indicated that the only step being taken to ensure compliance with this requirement was the issuance of regulations requiring that each employee "is notified and signs a statement to the

effect that he is aware of" the requirement. The questionnaire answer also stated that "at this time the Commission does not intend to engage in actively tracking and monitoring the employment records of departing employees." The Commission further stated, in its answer to question 17, "There are no periodic checks. Any impropriety would most likely reach the Commission through word of mouth." Is this still an accurate statement of the Commission's enforcement and compliance effort with respect to this requirement? Is this effort adequate to ensure compliance? Does the Commission contemplate instituting a program to ensure compliance with this statutory requirement? If so, when?

9) With regard to petitions received by the Commission:

a) How many of those received under the Consumer Product Safety Act have been answered in 120 days? How many of those under the transferred acts have been answered in 120 days?

b) What is the average time of response to a petition under the Consumer Product Safety Act? Under the transferred acts?

c) What is the average age of the petitions now pending under the Consumer Product Safety Act? Under the transferred acts?

10) In December 1974, the repurchase and disposal provisions of the Commission's order in the Pactra case were stayed by the Ninth Circuit Court of Appeals. Nearly a year later, on November 6, 1975, this stay was lifted. The Commission did not publish a notice in the Federal Register announcing that this stay had been lifted until February 6, 1976.

a) Why did it take the Commission three months to publish notification that its repurchase order was once again in effect?

b) During this three month period, was the Commission enforcing the repurchase order? What was the nature of the Commission's enforcement actions?

c) The Federal Register notice states that the Commission "intends to monitor compliance and, if necessary, to take appropriate enforcement action." How is the Commission monitoring compliance with this repurchase order?

11) The Commission published proposed Freedom of Information Act rules on August 21, 1974. 39 Fed. Reg. 30297. Those rules have never been published in final form. Since the time they were published, the Freedom of Information Act has been amended, and the rules now fail to comply with the amended Act. For example, the rules allow the Commission to charge FOIA requestors for the time spent by the Commission personnel in making deletions of exempt material, section 1015.9(f), even though the amended Act provides that fees "shall . . . provide for recovery of only the direct costs of . . . search and duplication." 5 U.S.C. 552(a)(4)(A).

a) In spite of the fact that the CPSC's regulations do not comply with the present statute, is the agency complying with the FOIA, as amended, in Freedom of Information matters?

b) When does the Commission intend to make the necessary modifications in its FOIA rules to bring them into compliance with the Act and publish the rules in final form?

12) The Commission published "proposed and interim rules of practice" for adjudicative proceedings on July 23, 1974. 39 Fed. Reg. 26847. Has the Commission determined yet when it will finalize these rules? If so, when?

13) It appears that a large portion of the resources which the Commission has allocated to regulatory development work under the Poison Prevention Packaging Act has been devoted to responding to petitions for exemption from the prescription drug rule. What steps is the Commission taking to alleviate this problem? Specifically, does the Commission intend to promulgate rules setting forth strict and explicit criteria for exemption from this rule?

14) In its answer to question 42 of the Subcommittee's questionnaire, the Commission stated that it intended soon to publish for public comment a set of regulations regarding the retraction of inaccurate information published under any of the Acts administered by the CPSC. The Commission took this action in response to a GAO recommendation growing out of GAO's study of the Marlin Toy Products matter. When does the Commission intend to publish those regulations?

15) The February 13, 1976, issue of Science magazine reported that, based on an erroneous report by the Consumer Product Safety Commission, several women had become fearful that their unborn children might have birth defects stemming from the mother's exposure to spray adhesives and that consequently they had unnecessarily had therapeutic abortions. What steps has the

Commission taken to ensure that the information it disseminates, particularly information pertaining to such emotional issues as mutagenic or teratogenic hazards, is correct?

16) A study prepared by the Subcommittee staff from information submitted by the CPSC in response to the Subcommittee's questionnaire of last summer shows that more than half of the official appearances of the five Commissioners have been before industry groups, while only one fifth of the official appearances have been before groups that could be characterized as consumer groups. (The staff study is attached to this letter.) What efforts is the Commission making to ensure that the Commissioners' travels expose them to a diversity of persons and groups.

17) The regulations implementing section 15 of the CPSA state that it is Commission policy "to enforce vigorously" the filing requirement imposed on manufacturers, distributors, and retailers by section 15(b). 16 CFR 1116.3(b). Furthermore, these regulations require that every staff investigation shall include a determination as to whether there has been a violation of the duty to file. 16 CFR 1116.6.

a) What steps is the Commission taking to ensure that those subject to the filing requirement of section 15(b) are aware of their obligations?

b) What other steps is the Commission taking to enforce vigorously the filing requirement?

c) Are the staff investigations required by section 1116.6 consistently being carried out? Have they uncovered any violations of the filing requirement?

d) Have there been any enforcement actions against persons who violated the filing requirement of section 15(b)?

18) An article which appeared in the September 1975 issue of The New Engineer entitled "Consumer Safety and the Botched Trouble Light Recall" alleged that the performance of the Commission's in-depth investigators may be inadequate.

a) Has the Commission made any evaluations of the adequacy of its procedures for in-depth investigations, and, if so, what have those evaluations indicated?

b) Does the Commission have any program to monitor the performance of its in-depth investigators and their compliance with Commission procedures?

19) Has the Commission considered promulgating its own rules to assist in the implementation of its responsibilities under the National Environmental Policy Act, i.e., rules similar to those promulgated by the Food and Drug Administration at 21 CFR Part 6? If not, what was the basis for the Commission's determination? If so, when will these rules be published?

20) Has the Commission considered promulgating any rules prescribing the circumstances under which a hearing will be granted in either a proceeding under section 15(b) of the CPSA or section 2(q) of the Federal Hazardous Substances Act? (The Food and Drug Administration has adopted so-called "summary judgment rules," 21 CFR 130.12(a)(5), setting out the circumstances under which an applicant will be granted a hearing under section 505(e) of the Federal Food, Drug, and Cosmetic Act in a proceeding for the withdrawal of a new drug application.) If the Commission has determined not to promulgate such rules, what is the basis for that determination? If the Commission has determined to promulgate rules, when will they be published?

21) Just before Christmas of 1975 the Commission discontinued the highly successful banned toy list.

a) Why was the list discontinued?
b) On what date was the decision to discontinue the list made?
c) On what date did you receive the NEISS report for FY 75 showing an increase over FY 73 of 21 percent in the number of toy-related injuries treated nationwide in hospital emergency rooms?
d) Since NEISS reports only toy-related injuries treated in hospitals, what is the Commission's estimate of the number of toy-related injuries occurring each year that are not treated in hospitals?
e) Would legislation granting the CPSC authority to require pre-market clearance of toys curtail toy-related injuries?
f) What is your estimate of the cost to effectively implement such legislation?
g) CPSC staff has advised that the banned toy list resources were shifted to the monitoring of injuries related to Christmas tree lights. What were the nationwide statistics on injuries related to Christmas tree lights, both at the time the banned toy list was discontinued and now?
h) What was the annual cost in appropriated funds to publish the banned toy list and what is the estimated annual cost in appropriated funds to implement the Christmas tree lights program?

22) In February 1975, CPSC personnel attended the Toy Fair in New York and, according to your public statement, "came away with the view that tremendous strides have been made by the industry in dealing with the toy safety problem." Since these observations were apparently used as a basis for the decision to discontinue the banned toy list, provide the Subcommittee any analyses, reports, or other documented details furnished to you in support of the improvements noted at the fair.

23) Information provided by the CPSC staff stated that although toy-related injuries were increasing, there were no increases in injuries from toys regulated by the CPSC.

a) Were the 1500 toys banned since 1970 only regulated toys?
b) How many of the present toy regulations were issued by the FDA prior to May 1973 when the CPSC assumed the responsibility?
c) How many toy regulations have been issued since May 1973 by the CPSC?
d) Provide copies of all the toy regulations.
e) Since roller skate injuries account for more than one-third of all toy injuries and are increasing substantially each year, have you issued or do you plan to issue regulations covering these toys? If not, why not? If it is impossible to reduce such injuries through design improvements and modifications, what is CPSC proposing to reduce such injuries?
f) Has an "Impact Analysis" similar to that prepared for snowmobiles been prepared for roller skate related toys?
g) For what products have Impact Analysis statements been prepared? Provide copies.

24) Budget information provided to the Subcommittee disclosed that the Commission requested $11,488 for FY 75 and $13,931 for FY 76 for "Hazard Analysis and Remedy."

a) Why was there a sharp decrease to $1,864 for this function in the FY 77 budget request?

b) Is the FY 77 request adequate? If not, why wasn't more requested?

Honorable Richard O. Simpson
Page Nine

25) The White House Domestic Council Review Group on Regulatory Reform, co-chaired by Messrs. MacAvoy and Schmults, has been widely publicized for its role in coordinating the various efforts and providing the inspiration for regulatory changes in Federal agencies.

a) Does the CPSC have a continuing dialogue with and provide input to this group?

b) Furnish the dates, subject matter, and results of contacts or meetings between this group and any Commission personnel?

In addition to responding to these questions, please furnish the Subcommittee with responses, updated to January 31, 1976, to the following questions from the Subcommittee's questionnaire of last summer: 31, 35, 55 (include an indication of which committees are chartered as "advisory committees" as prescribed by the Federal Advisory Committee Act), 71, 73, 93, and 94.

In order that the other Commissioners may have an opportunity to address, in the statements they are preparing for inclusion in the record, any of the policy issues to which some of the above questions relate, I have furnished each of them with a copy of this letter.

Please submit the material requested in this letter, as well as material requested during the hearing, by March 19, 1976.

Sincerely,

JOHN E. MOSS
Chairman
Oversight and
Investigations Subcommittee

JEM:rbj

Attachment *

cc: Commissioner Barbara H. Franklin
Commissioner Lawrence M. Kushner
Commissioner R. David Pittle

*[The attachment is in the Subcommittee's files; a more current analysis, based on data obtained in response to this letter's request for an updated response to Question No. 73 of the Subcommittee questionnaire, appears below.]

U.S. CONSUMER PRODUCT SAFETY COMMISSION
WASHINGTON, D.C. 20207

MAR 2 2 1976

Honorable John E. Moss
Chairman, Subcommittee on Oversight
and Investigations
Committee on Interstate and Foreign
Commerce
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

Reference is made to your March 3, 1976 letter requesting additional information for the record of the Consumer Product Safety Commission Oversight Hearings of January 30 and February 19, 1976.

I am pleased to enclose our responses to your twenty-five questions, and updated responses to several questions from the Subcommittee's June 25, 1975 questionnaire.

Please do not hesitate to contact me if I can provide any further information.

Sincerely,

Richard O. Simpson

Richard O. Simpson
Chairman

Enclosures

1. QUESTION

Much thought is being given by this Subcommittee and others currently considering government regulation to the question of how greater agency independence can be achieved. You spoke in your opening statement of the need for greater accountability. Do you believe that accountability and independence are, to a large degree, mutually exclusive?

ANSWER

I do not believe they are necessarily mutually exclusive. I can make a case for concern, however, that they could become so unless greater Congressional oversight is exercised.

The independence which is sought for regulatory agencies is basically an independence from the Executive Branch. If this is to be, then it follows that as that independence grows, examination by the Congress of the agencies involved must also increase.

It is not at all obvious to me that the Congressional oversight function as it is applied to an agency such as NHTSA or FDA or EPA differs greatly from that which has been applied to CPSC or FTC or other Commissions. If that is so, then, in my view we are, in fact, less accountable than those agencies.

In the case of the Consumer Product Safety Commission, I personally have felt that we have been held accountable, for we have had substantial Congressional attention, review, and general and specific oversight. That could, however, be in large measure a result of our newness.

My observation could be confirmed, I would think, by a review of the activities of older independent agencies to determine if and to what degree they are, as charged, captured by the industries they regulate, and how they are performing their original functions as stated by the Congress.

In summary, I believe that accountability is determined by the consistent exercise of thorough review and assessment of performance against a measurable plan for implementation of the statutory responsibilities assigned to the agency.

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2. QUESTION

You also mentioned in your opening statement that you favor a single-administrator agency over a collegial agency. Will you explain exactly why?

ANSWER

I generally believe that an organization in which decisions are made by and direction is given by a single administrator has a greater capacity for efficient and consistent action, with a minimum of undue delay. Vesting this authority totally in a single administrator places the responsibility and the accountability for the actions of the agency squarely on that party, and ensures a predictability of action which will be of benefit both to the regulated industries and to the agency staff. Basically, I believe decision by committee does not guarantee - or even lend itself to - better decision-making. It is, in my view, and in the view of those involved in teaching or implementing good management practices, an unworkable alternative for effective and productive leadership of an organization. In addition, the procedural safeguards contained in the Consumer Product Safety Act are more than adequate to guard against unfair and/or biased decisions from a single administrator.

3. QUESTION

Section 27(k)(1) of the Consumer Product Safety Act requires the Commission to transmit concurrently to the Congress any budget estimate or request it submits to the President or OMB.

a) Do you think this provision has enhanced the agency's independence?

b) What effect has this provision had on the agency's ability to secure the funding it believes is necessary?

ANSWER

It is not possible, with only a few years of experience, to determine with any certainty whether the provisions of section 27(k)(1) can or will work in a productive manner in the long term. In retrospect , however, I believe that the requirement has been counter-productive for us, and I have personally recommended that it be repealed.

A large part of the problem, I feel quite certain, stems from the fact that we were for a time the only agency of the government with this unique budget requirement, and our actions with respect to budget requests and justifications were not widely understood. It is my belief that, as a result, this agency has never had an adequate base budget.

While the provision has certainly added to the agency's independence, it is a fact of life that support must come from somewhere outside the agency if adequate funding is to become a reality.

Understandably, the reaction from the Executive Branch has been negative. The agency, as it attempted to administer the statute under which it was created, has been looked upon as a maverick and an upstart. The provision itself threatens the control of the budget which rests with OMB as a result of the Budget and Accounting Act of 1921.

On the other hand, we have had difficulty explaining to members and their staffs why we were submitting two budgets and what the two sets of figures represented.

It is my view that section 27(k)(1) places a burden on the Congress to provide the kind of support that may well be lost from OMB, and that Congress has not fully realized this implication of the provision.

As I stated earlier, "At what point this budget provision can be considered counterproductive is not easily detectable and at which point the damage can be reversed is not easily predictable. The section should be examined in detail, in retrospect, and if the budget system cannot support this unique provision, I would urge that it be repealed."

4. QUESTION

It appears that there may be a conflict between section 27(k) of the Consumer Product Safety Act and 31 U.S.C. 15 (as implemented by OMB Circular A-10) with regard to the appropriate position for you to take when the budget proposed by CPSC differs from that proposed by the President. In a letter to you dated January 29, 1976, which I inserted into the Congressional Record of February 11, 1976 (page E608), OMB Deputy Director Paul H. O'Neill stated:

> The President expects each official in the Commission to support actively the budget amounts set forth in this letter and its enclosures. This support should be given in testimony before Congressional committees, in informal contacts with members of Congress and their staffs, and in speeches and meetings with outside groups.

a) Has the Commission adhered to that instruction from OMB?

b) What effect to section 27(k) and the Commission's status as an "independent" agency (section 4(a) of the Consumer Product Safety Act) have on the Commission's obligations under 31 U.S.C. 15 and OMB Circular A-10?

ANSWER

CPSC has honored the restrictions on premature disclosure of Presidential recommendations contained in OMB Circular A-10 and has submitted justifications for both the level of spending recommended by the Commission and the level recommended by OMB. I have not, however, adhered to the quoted instruction from OMB, as can be noted from a review of my testimony of February 20, 1975 before the Appropriations Committee of the House on a proposed rescission.

Since my statement at that time is directly relevant to this question, I am submitting it for the record at this point.

I have consistently supported before the appropriate committees of the Congress my best estimate of an adequate level of funding for this agency as required by the Consumer Product Safety Act. This figure has been at variance with the Administration's request in both FY 1976 and 1977.

STATEMENT OF RICHARD O. SIMPSON, CHAIRMAN
U. S. CONSUMER PRODUCT SAFETY COMMISSION
BEFORE THE SUBCOMMITTEE ON HUD-INDEPENDENT AGENCIES
COMMITTEE ON APPROPRIATIONS
HOUSE OF REPRESENTATIVES, FEBRUARY 20, 1975

Mr. Chairman:

It is traditional when testifying to indicate pleasure at being afforded an opportunity to present a point of view favoring or opposing a specific proposal or concept. To be candid, however, Mr. Chairman, for reasons I will attempt to explain in this brief statement, I am not particularly pleased to be here today.

First, may I state that this is an historic occasion. It is historic, one, because it deals with a new process within the Congress, and, two, because it is the first time since the creation of the Consumer Product Safety Commission that an appropriation action has been requested by the Administration which is at variance with the figures submitted concurrently to the Congress and OMB under the requirements of Section 27(k) of the Consumer Product Safety Act, P.L. 92-573.

And now, to the area of my discomfort on this occasion--the apparent conflict between Section 206 of the Budget and Accounting Act of 1921 and Section 27(k) of the Consumer Product Safety Act.

In Section 206 of the Budget and Accounting Act of 1921 (31 U.S.C. 15) it is stated that "no (budget) estimate or request....(should) be submitted to Congress or any committee thereof by any officer or employee of any department or establishment, unless at the request of either House of Congress."

One of the regulations that expressly implements 31 U.S.C. 15 is OMB circular A-10, which, in Sections 6(b) and (c), enjoins me, as Chairman of the Commission and head of an executive establishment, to refrain from expressing an opinion which is inconsistent with the programs and appropriation requests that the President has transmitted to the Congress. Further, the circular states that if asked for an opinion, an executive official must point out that his responsibilities go to just one of the many programs which the President must consider in determining allocation of Federal funds, and must make it clear that the opinion given is not a request for additional funds.

On the other hand, Section 27(k)(1) of the Consumer Product Safety Act states that the Commission shall submit any budget estimate or request to the Congress at the same time that it submits such estimates or requests to the President or the Office of Management and Budget.

Section 27(k)(2) of the Act states that all legislative recommendations, testimony, or comments on legislation transmitted to OMB or the President must be concurrently transmitted

to the Congress, and further states that no officer or agency of the United States shall have any authority to require the Commission to submit its legislative recommendations, or testimony, or comments on legislation, to any officer or agency of the United States for approval, comments, or review, prior to submission to the Congress.

The dilemma becomes apparent. In view of this obvious conflict, coupled with the basic requirement that the Agency administering an act must also interpret that act, I requested an opinion from our General Counsel as to my responsibilities. The conclusion of the General Counsel was that "The Consumer Product Safety Commission is not subject to the procedure outlined by OMB Circular No. A-10, because 31 U.S.C. 15, which is the statutory basis of that procedure was made inapplicable to the CPSC by Section 27(k)(1) of P.L. 92-573."

He further concludes that "(the) language provides a standing request by Congress for CPSC to submit budget information directly to Congress and thus provides an exception to Section 206 of the Budget and Accounting Act....

"In effect, Section 27(k)(1) sets the CPSC apart from other Executive establishments by putting it in direct communication with Congress as well as with the President with respect to budget information, by passing the usual procedure

of Presidential 'pre-clearance.'"

I have found in this case, however, what I have known for some time to be a truism, that is, that two lawyers rarely agree on anything...and this is no exception. The General Counsel advises that it is also possible to defend the contrary interpretation.

Unfortunately the Commission finds itself in the middle of what appears to be a serious, historic, and continuing struggle between the Congress and the OMB over fiscal matters.

And therein lies my dilemma, and my source of unhappiness at this appearance.

For further information of the Subcommittee, I am submitting background materials relating to the relationship of this Commission with OMB, and the views of OMB on the terms of that relationship.

There is now a new Director of the Office of Management and Budget. I have not had an opportunity, since he has been in office such a short time, to sit down with Mr. Lynn and discuss the new process and the conflicting interpretations with him. We have also not had the opportunity thus far in the session to meet with you, Mr. Chairman, to seek your views and guidance on the conflict mentioned above. We are scheduled for our first full oversight hearing next Thursday in the Senate, and the problem will be raised for discussion at that time, possibly in anticipation of legislative clarification.

Frankly, I am not sure, Mr. Chairman, whether I am bound by OMB Circular A-10 and must therefore speak in support of this rescission, as directed by the President, or whether the General Counsel's interpretation of my accountability permits me to defend the figure which my best judgment has caused me to submit as the measured, responsible fiscal requirements of the agency.

I ask, therefore, that I not be required today to pick a definitive position on this conflict. My primary concern is that neither the Agency nor the public become the victim of this struggle. Hoping that you will recognize my dilemma, I will be happy to answer any factual question on the effect of the rescission on our agency and its operations and programs.

Thank you, Mr. Chairman.

5. QUESTION

The Commission's General Counsel has construed section 4(f) of the Consumer Product Safety Act as giving the Commission Chairman exclusive authority as to budget matters.

a) Why is the budget not a general policy matter within the meaning of Section 4(f)(2) of the CPSA which provides that "the Chairman shall be governed by general policies of the Commission . . ."?

ANSWER

Section 4(f)(1) of the CPSA states that the Chairman "shall exercise all of the executive and administrative functions of the Commission, including functions of the Commission with respect to . . . the use and expenditure of funds." Section 4(f)(2) states that in carrying out this function, "the Chairman shall be governed by general policies of the Commission . . ."

I believe that in executing my Section 4(f)(1) authority to develop and execute the budget, I have, in fact, been guided by the general policies of the Commission.

b) Exactly what role have the other Commissioners played in the budget process to date?

ANSWER

The budget, as previously indicated, has, by statute, been within the executive authority of the Chairman. Under legislation currently in conference, this would change, and the Commissioners would have a mandated role to review and concur with the budget document.

The Commissioners have not played an active role in the budget process to date, although I did seek the assistance of the Vice Chairman in the preparation of the first budget to be submitted by this agency. In that year and in subsequent years, budget requests and justification documents have been sent to the Commissioners both for their information and their review.

6. QUESTION

In declining to prosecute a number of your agency's criminal referrals, the Department of Justice has criticized CPSC referrals for several reasons:

a) Too much time has passed between the date of the alleged offense and the date of referral to the Department of Justice.

b) The facts of the case do not have sufficient appeal to obtain a jury verdict. For example, the hazard may not appear severe (one case in which the prosecution was declined involved lacerations caused by a pipe cleaner), or the violation of law alleged may be de minimus (one case involved slats in a baby crib deviating only a few thousandths of an inch from the prescribed separation).

c) The violator has subsequently brought his practices into compliance with the Act.

d) Improper CPSC investigative techniques were employed. In one case, the Department of Justice indicated that the CPSC investigator may have illegally entrapped a potential defendant.

e) The referral package was improperly prepared.

Are these criticisms by the Department of Justice justified? If so, what specific steps is the CPSC taking to alleviate these problems?

ANSWER

The Commission does not believe that the criticisms leveled by the Department of Justice are justified. To respond specifically:

a) Unquestionably there is an inevitable passage of time between the discovery of a violation by a field investigator and the time that a recommendation for criminal prosecution is forwarded to the Department of Justice and local United States Attorneys. Following an initial review by a Commission Area Office, the case is ultimately reviewed by the Commissioners in executive session. If a majority of the Commission votes in favor of prosecution, the case is then forwarded to the Department of Justice and local United States Attorney, with all pleadings prepared for filing.

Revised procedures have been implemented during the past year to expedite the case review process. Thus, while a case moved along more slowly in the initial months of Commission operation, the Bureau of Compliance now has as its goal the processing of all cases within the Bureau within one to three months, depending on the complexity of the case.

The Commission believes that its time record for forwarding cases compares favorably with other federal agencies, particularly new agencies in their initial periods of operation.

b) The case involving lacerations by a pipe cleaner was the first criminal recommendation forwarded to the Department of Justice. The investigation and case file had been prepared by the Food and Drug Administration under the Federal Hazardous Substances Act, prior to the transfer on May 14, 1973 of the functions under that Act to the Commission.

Following that initial referral, the General Counsel's Office physically inspected all banned toys before forwarding any case to the Department of Justice for prosecution.

As to baby crib slats allegedly deviating only a few thousandths of an inch from the requirements of Title 16 of the Code of Federal Regulations, Part 1508, the Commission believes that, since Part 1508 was duly promulgated into law in full accordance with the due process requirements of the Administrative Procedure Act, any crib slats which are spaced farther apart than the maximum distances set forth in 16 CFR 1508.4 are hazardous and banned as a matter of law. Therefore, it is inappropriate to argue in a subjective factual vein whether a deviation is "great" or "small."

c) In the Commission's opinion, the fact that a violator has subsequently brought his practices into compliance with the law does not ipso facto justify dropping all charges. Very few law-breakers refuse to comply with the law once they are discovered. To follow the Department of Justice policy would allow every person subject to our authority one "free" offense before they are prosecuted. Neither the laws we administer nor our resources permit such an approach.

As the Commission explains in its cover letter to each recommendation to the Department of Justice for criminal prosecution, the agency's field investigational capabilities, by our best estimate, reach only a fraction of 1% of the physical facilities of industry. For this reason, clearly motivating forces must operate to encourage and stimulate compliance among the firms subject to very infrequent inspectional coverage. Successful criminal prosecutions of known violators, regardless of later compliance by the firm, can, in the Commission's opinion, provide the desired motivation for other members of industry.

d) The charge of alleged entrapment by a Commission investigator is without basis in fact or law. The circumstances which gave ris to the ill-founded charge involved an undercover purchase of a banned baby crib.

The merchant told the undercover purchasing investigator that the display crib was banned from sale by the federal government, but at the same time he encouraged the investigator to purchase the crib. The facts did not involve an investigator attempting to talk a merchant into violating the law on the basis of an emergency situation involving a pregnant wife or otherwise. The merchant willfully and deliberately made the sale of the banned crib to the investigator. Hence, no charge of alleged entrapment should have been made by the Department of Justice.

e) The allegation that the referral package was improperly prepared is totally unfounded. To the best of our information and belief, no U.S. Attorney has had cause to complain that the Commission's referral package was improperly prepared.

7. QUESTION

The Commission's answer to question 12 of the Subcommittee's questionnaire which was sent last summer, pertaining to prior employment of agency personnel, stated as follows:

> To the best of my knowledge, no CPSC commissioners or GS-15 or higher employees have come directly or indirectly from employment in or compensation by the industries regulated by or subject to our jurisdiction.

Is this still an accurate statement? If not, please furnish the name, current position, and prior employment of each GS-15 or higher employee who has come directly or indirectly from regulated industries.

ANSWER

The above is still an accurate statement.

8. QUESTION

Section 4(g)(2) of the Consumer Product Safety Act provides in part:

> No full-time officer or employee of the Commission who was at any time during the 12 months preceding the termination of his employment with the Commission compensated at a rate in excess of the annual rate of basic pay in effect for grade GS-14 of the General Schedule, shall accept employment or compensation from any manufacturer subject to this Act, for a period of 12 months after terminating employment with the Commission.

a) Have there been any violations of this provision to date?

ANSWER

To the best of our knowledge, there have been no violations of Section 4(g)(2) of the Consumer Product Safety Act to date.

b) The Commission's response to question 14 of the questionnaire indicated that the only step being taken to ensure compliance with this requirement was the issuance of regulations requiring that each employee "is notified and signs a statement to the effect that he is aware of" the requirement. The questionnaire also stated that "at this time the Commission does not intend to engage in actively tracking and monitoring the employment records of departing employees." The Commission further stated, in its answer to question 17, "There are no periodic checks. Any impropriety would most likely reach the Commission through word of mouth." Is this still an accurate statement of the Commission's enforcement and compliance effort with respect to this requirement? Is this effort adequate to ensure compliance? Does the Commission contemplate instituting a program to ensure compliance with this statutory requirement? If so, when?

ANSWER

The above is still an accurate statement of the Commission's enforcement and compliance effort with respect to Section 4(g)(2) of the Consumer Product Safety Act. The Commission considers the effort of informing the employees of their responsibilities under the Act to be adequate to ensure compliance. The Commission does not contemplate instituting any additional action at this time to ensure compliance with this statutory requirement.

9. QUESTION

With regard to petitions received by the Commission:

a) How many of those received under the Consumer Product Safety Act have been answered in 120 days? How many of those under the transferred acts have been answered in 120 days?

b) What is the average time of response to a petition under the Consumer Product Safety Act? Under the transferred acts?

c) What is the average age of the petitions now pending under the Consumer Product Safety Act? Under the transferred acts?

ANSWER

In response to this question, we have prepared the attached tables showing action on petitions which the Commission has received under the Consumer Product Safety Act, the Flammable Fabrics Act, the Federal Hazardous Substances Act, and the Poison Prevention Packaging Act. The information in these tables is correct as of March 12, 1976.

The information sought in part (a) of the question appears in the first three columns for each Act: Petitions Received, Acted on in 120 Days, Acted on in more than 120 Days.

The fourth column, Average Response Time, answers part (b).

Answers to part (c) appear in the final two columns: Pending, and Average Age (of pending petitions).

As shown in the footnotes, we have not counted petitions which have been withdrawn by the petitioners or subsequently ruled not to be petitions by the Office of the General Counsel (OGC).

Act	Fiscal Year	Petitions Received	Acted on in 120 days	Acted on, More Than 120 days	Average Response Time	Pending	Average Age
Consumer Product Safety Act (CPSA)	FY-73	6	1	5	121 days	--	--
	FY-74	17[1/]	8[2/]	8	216 days	1	697 days
	FY-75	24[3/]	2	7	248 days	15[4/]	391 days
	FY-76	9[5/]	1	1	116 days	7	124 days[6/]
	Total	56	12	21	201 days	23	323 days[7/]

Notes:

1/ 1 petition withdrawn by petitioner and thus not counted here.

2/ 1 petition granted under CPSA in 63 days; later granted under FHSA in 112 days; counted under both Acts.

3/ 1 petition subsequently combined with another from same petitioner and thus not counted here. Also, 2 petitions subsequently ruled not petitions by OGC and thus not counted here.

4/ 2 CPSA petitions also counted as pending under FHSA.

5/ 5 of these petitions received after October 27,1975, the date on which the 120-day requirements became fully effective. Another petition was subsequently withdrawn by the petitioner and thus is not counted here.

6/ Of 5 petitions received after October 27,1975 (see note 5, above), average age is 97 days.

7/ Oldest pending CPSA petition received January 2,1974; newest received January 9,1976.

As of March 12,1976

Act	Fiscal Year	Petitions Received	Acted on in 120 days	Acted on, More Than 120 days	Average Response Time	Pending	Average Age
Flammable Fabrics Act (FFA)	FY-73	5	4	--	1 day	1	823 days
	FY-74	16	6	6	163 days	4	857 days
	FY-75	18[1/]	12[2/]	2	56 days	4	446 days
	FY-76	4	--	--	--	4	206 days
	Total	43	22	8	91 days	13	540 days[3/]

Notes:

1/1 petition withdrawn by petitioner; 1 petition subsequently ruled not a petition by OGC; neither counted here.

2/11 similar petitions from garment manufacturers, etc. requesting 60-day delay in implementation of labeling requirements denied May 2 and 8,1975, from 3 to 13 days after receipt.

3/ Oldest pending FFA petition received June 29,1973; newest received August 19,1975.

As of March 12,1976

Act	Fiscal Year	Petitions Received	Acted on in 120 days	Acted on, More Than 120 days	Average Response Time	Pending	Average Age
Federal Hazardous Substances Act (FHSA)	FY-73	3	3	--	90 days	--	--
	FY-74	17[1/]	7[2/]	7	193 days	3	543 days
	FY-75	19[3/]	3	8	177 days	8[4/]	393 days
	FY-76	7[5/]	--	2	94 days	5	129 days
	Total	46	13	17	170 days	16	341 days[6/]

Notes:

1/ 1 petition subsequently classified not a petition by OGC and thus not counted here.

2/ 1 petition granted under CPSA in 63 days; later granted under FHSA in 112 days; counted under both Acts.

3/ 1 petition subsequently classified not a petition by OGC; 1 petition withdrawn by petitioner; neither counted here.

4/ 2 FHSA petitions also counted as pending under CPSA.

5/ 1 petition withdrawn by petitioner and thus not counted here.

6/ Oldest pending FHSA petition received December 17,1973; newest received March 3,1976.

As of March 12,1976

Act	Fiscal Year	Petitions Received	Acted on in 120 days	Acted on, More Than 120 days	Average Response Time	Pending	Average Age
Poison Prevention Packaging Act (PPPA)	FY-73	5	5	--	35 days	--	--
	FY-74	47[1/]	25	20	167 days	2	724 days
	FY-75	11[2/]	2	7	316 days	2	573 days
	FY-76	5[3/]	--	1	170 days	4	126 days
	Total	68	32	28	178 days	8	386 days[4/]

Notes:

1/ 2 petitions withdrawn by petitioners and thus not counted here.

2/ 4 petitions withdrawn by petitioners and thus not counted here.

3/ 4 petitions withdrawn by petitioners and thus not counted here.

4/ Oldest pending PPPA petition received March 13,1974; newest received September 24,1975.

As of March 12,1976

10. QUESTION

In December 1974, the repurchase and disposal provisions of the Commission's order in the Pactra case were stayed by the Ninth Circuit Court of Appeals. Nearly a year later, on November 6, 1975, this stay was lifted. The Commission did not publish a notice in the Federal Register announcing that this stay had been lifted until February 6, 1976.

a) Why did it take the Commission three months to publish notification that its repurchase order was once again in effect?

ANSWER

The firms with large outstanding stocks of banned vinyl chloride products which had not yet been repurchased were parties to this suit and became aware of the court order lifting the stay upon its issuance. There is no legal requirement that notice of such an order be published in the Federal Register. The Commission elected to do so in order to achieve wider public and industry awareness that the stay had been lifted.

b) During this three month period, was the Commission enforcing the repurchase order? What was the nature of the Commission's enforcement actions?

ANSWER

Our standing instruction to the Area Offices was to enforce those portions of the vinyl chloride ban not affected by the stay of the repurchase regulation. As soon as the Court lifted the stay, the involved firms had a legal duty to repurchase. Our inspections and monitoring of the repurchase will determine the firms' good faith compliance with the law, since the Court's decision.

c) The Federal Register notice states that the Commission "intends to monitor compliance and, if necessary, to take appropriate enforcement action." How is the Commission monitoring compliance with this repurchase order?

ANSWER

The Commission's field force has recently inspected the three major producers who were parties to the suit and who have recently

initiated repurchase. The field force will monitor the repurchase by these firms through inspections of selected consignees to insure that effective repurchase notification is made and proper action taken by recipients. In cases of non-compliance, appropriate legal actions as prescribed by the Federal Hazardous Substances Act will be initiated.

11. QUESTION

The Commission published proposed Freedom of Information Act rules on August 21, 1974. 39 Fed. Reg. 30297. Those rules have never been published in final form. Since the time they were published, the Freedom of Information Act has been amended, and the rules now fail to comply with the amended Act. For example, the rules allow the Commission to charge FOIA requestors for the time spent by the Commission personnel in making deletions of exempt material, section 1015.9(f), even though the amended Act provides that fees "shall . . . provide for recovery of only the direct costs of . . . search and duplication." 5 U.S.C. 552(a)(4)(A).

a) In spite of the fact that the CPSC's regulations do not comply with the present statute, is the agency complying with the FOIA, as amended, in Freedom of Information matters?

ANSWER

Yes, the Commission is complying with the Freedom of Information Act as amended.

b) When does the Commission intend to make the necessary modifications in its FOIA rules to bring them into compliance with the Act and publish the rules in final form?

ANSWER

A draft final regulation, incorporating both comments received regarding the August 21, 1974 proposed rules, as well as the subsequent FOI amendments, has been completed. This draft regulation is now on the agenda for the Commission's consideration at its March 25 Executive Session.

12. QUESTION

The Commission published "proposed and interim rules of practice" for adjudicative proceedings on July 23, 1974. 39 Fed. Reg. 26847. Has the Commission determined yet when it will finalize these rules? If so, when?

ANSWER

The Commission has not determined when its "proposed and interim rules of practice" for adjudicative proceedings will be finalized, and is, in fact, seeking to gain more experience using these rules before final rules are issued.

The Interim Rules of Practice and Adjudicatory Proceedings have been employed in only 6 cases which have traversed the hearing process. They are:

(1) CPSC Docket No. 74-4, Relco, Inc. A section 15 proceeding involving the determination of whether a Wel-Dex Electric Arc Welder represents a substantial product hazard and whether the manufacturer should be required to elect between repair, replacement or refund less a reasonable allowance for use. The hearing was recently re-opened to take testimony concerning an injury and the initial decision thereon is pending.

(2) CPSC Docket No. 75-1, White Consolidated Industries, Inc., involving a section 15 proceeding concerning a fire hazard in the defrosting unit of the Kelvinator refrigerator. Commissioner Newman, acting as Presiding Officer, found in favor of Respondent, no appeals were filed, and the Commission dismissal of the Notice of Enforcement is pending.

(3) CPSC Docket No. 75-2, Bay Area Mattress Company. Enforcement action taken under the Flammable Fabrics Act involving mattresses which were not tested, labeled, and recorded in accordance with the mattress flammability standard. Final decision was issued on January 29, 1976.

(4) CPSC Docket No. 75-5, Barrett Carpet Mills. Involves an enforcement action under the Flammable Fabrics Act involving carpets which allegedly failed the standard. Hearing in this case was completed February 13. Initial decision is pending.

(5) CPSC Docket No. 75-16, Francis Alonso, d/b/a Mylar Star Kites. Involved a section 15 enforcement action brought against the manufacturer of aluminized kites, which, when intersecting with power lines, allegedly present a substantial product hazard. The proceeding was heard February 24 and 25. Initial decision is pending.

(6) CPSC Docket No. 75-21, Westland Carpet Mills. An enforcement action under the Flammable Fabrics Act involving a carpet which was not tested, labeled, and recorded in accordance with the carpet flammability standard. This case was heard March 2, 3, and 4, and is pending initial decision.

13. QUESTION

It appears that a large portion of the resources which the Commission has allocated to regulatory development work under the Poison Prevention Packaging Act has been devoted to responding to petitions for exemption from the prescription drug rule. What steps is the Commission taking to alleviate this problem? Specifically, does the Commission intend to promulgate rules setting forth strict and explicit criteria for exemption from this rule?

ANSWER

Petitions for exemption from the Poison Prevention Packaging Act (PPPA) prescription drug rule have required the use of significant resources, as expected. At the time CPSC was established, there was a backlog of these petitions. However, we have eliminated the backlog and processed additional petitions requesting exemption from the human oral prescription drug regulation. Currently there are six such exemption petitions pending; two of these were received in January without all of the needed information. Processing cannot proceed until the requested information has been received from the petitioner.

Concurrently with reducing the backlog, the Commission staff has developed definitive criteria for considering PPPA exemptions. A draft (see copy attached) of these criteria, prepared in Federal Register format, is currently being rewritten as a rule, instead of a policy. This rewrite will then be processed through other concerned staff units and presented to the Commission for decision.

[16 CFR 1700]

Statement of Policy Interpretation

Criteria for Considering Requests for Exemption from the Child Protection Packaging Standards

The legislative history of the Poison Prevention Packaging Act of 1970 indicates that exemptions from special packaging standards may be considered. The preamble to the document promulgating the testing procedure for special packaging (36 FR 22151) indicated that the Commissioner of the Food and Drug Administration was prepared to grant individual exemptions from specific product standards in recognition of the fact that the amount of a household substance in a package may not be toxic or harmful. Subsequently, the Commissioner of the Food and Drug Administration stated in several preambles to regulations such as those for aspirin (37 FR 3427) and for oral prescription drugs (38 FR 9431) that any request for exemption from a special packaging standard would be considered by the Commissioner. Such a request had to be in writing and furnish reasonable grounds therefore, including, but not limited to, information such as available human experience data, relevant experimental data, toxicity information, product and packaging specifications, labeling, marketing history and the justification for the exemption. If such request furnished reasonable grounds therefore, the Commissioner would publish a notice in the FEDERAL REGISTER proposing the amendment to the standard. Following such publication, the proceedings would be the same as prescribed by section 5 of the Act.

Effective May 14, 1973, section 30 (a) of the Consumer Product Safety Act [Public law 92-573, 86 Stat. 1231; 15 U.S.C. 2079 (a)] transferred functions under the Poison Prevention Packaging Act of 1970 to the Consumer Product Safety Commission.

Subsequently, on August 7, 1973 (38 FR 21247) the Consumer Product Safety Commission revised and transferred the regulations under the Poison Prevention Packaging Act of 1970 (21 CFR Part 295 became 16 CFR Part 1700.) Accordingly, this statement involves 16 CFR 1700.

The Commission recognizes that the current guidelines for exemption are too broad and have resulted in differing types and amounts of data being submitted by those manufacturers requesting such exemptions.

Although the Commission recognizes that reasonable grounds for exemption may vary from one product to another and types of data which are relevant for one may not be relevant for another, the types of data and information set forth in this document are considered minimal in order to demonstrate that the product for which an exemption is being requested does not require child-resistant packaging in order to protect children from serious personal illness or injury. The Commission believes that it should take a conservative position in the granting of exemptions to child-resistant packaging regulations. The Commission emphasizes that, in view of the provisions in Section 4 (a) and (b) of the Act relating to non-complying packaging, the burden of proof relative to the safety of the product rests with the petitioner. The final test will be whether, in fact, proper and sufficient data have been provided which would justify

consideration of the request for exemption of the product from the child protection packaging standards.

The types of data which the Commission requires in order to adequately evaluate requests for exemption are delineated in the following paragraphs:

General Considerations

1. Procedural: [Note: OSCA should detail the procedures necessary in the proper submission of an exemption petition to the Commission. A synopsis of the methods used by the Commission in reviewing and evaluating such requests would probably be helpful and informative.]
2. Justification for Exemption: All petitions for exemption from regulations promulgated under the Poison Prevention Packaging Act of 1970 must set forth a justification for such exemption. Each petitioner is required to establish why the exemption is desired; how the lack of toxicity and adverse human experience clearly supports granting the exemption request and why such exemption will not expose children to serious personal illness or injury.
3. Relevancy of Experimental Data: Relevant experimental data includes, but is not limited to, all data with respect to the hazard associated with the product. Generally, this primarily will involve those hazards arising from the accidental ingestion of a product. Where multiple hazards are known to exist (potential for significant allergenicity, dermal and/or opthalmic injury etc.) animal and human (where appropriate) studies evaluating the nature and degree of such hazards must be submitted.

4. Incompatability of Child-Resistant Packaging with Material Petitioned for Exemption: Manufacturers submitting exemption requests based upon a contention that child resistant packaging compromises the utility, stability or compatibility of a substance must submit adequate supportive evidence. In this respect, limitations of package choice due to NDA filing and/or shelf life should be outlined along with a time schedule to revise the NDA and/or re-establish shelf life data.

5. Failure to Provide Information: The failure to provide adverse information in the possession of or accessible to the petitioner shall be grounds for denial. Note: OGC may wish to comment here on the advisability of more stringent legal sanctions.

6. Trade secrets: Manufacturers submitting information which they consider to be confidential or trade secrets should so identify and explain such information per The Freedom of Information guidelines published by the Commission. [Note: this item should be explained in detail by OSCA].

7. Requests for Extension of Effective Date: The Commission notes that the Act itself states that the effective date shall not be longer than one year. Requests for temporary exemptions or extensions may be considered where extraordinary circumstances can be shown. Such requests for temporary exemptions should be accompanied by documentary evidence of timely, good faith efforts to secure special packaging. Pertinent animal toxicity and human experience data must also accompany such requests.

8. Responsibility of Petitioner: It is the responsibility of the petitioner, and to his advantage, to ensure that all data submitted are adequate to allow a thorough and objective appraisal of his exemption request. The Commission shall, however, determine the adequacy of all such data submitted in support of an exemption request and will suspend processing of an exemption request after first notifying the petitioner of inadequacies in his supportive documentation.

9. Technical Support of Exemption Requests: The types of technical data necessary to support an exemption request are outlined in the following paragraphs:

A. Human experience data. Human experience data will be used as the primary criteria for evaluating exemption requests. The Federal Food, Drug and Cosmetic Act requires that an NDA must be approved before a new drug can enter into interstate commerce. Approval of the NDA indicates that the drug has been proven safe and effective for the purpose for which it is intended. Since the lack of an approved NDA precludes the existence of sufficient human use data, the Commission will not entertain exemption petitions for such drug products. Such data shall include a compilation of all available adverse reports pertaining to the specific product. In this respect, reports of significant allergenicity must be included. Reports on similar products are acceptable only when such reports are clearly associated with adverse reactions due to a common ingredient. These reports may be found in such sources as:

(1) Reports from poison control centers.

(2) Reports of adverse reactions relative to the product which

have been submitted to the company by physicians, hospitals, consumers and other sources.

(3) Extensive searches of the medical, pharmacological and toxicological literature.

In the case of drugs, these reports also involve those required to be reported under the Food and Drug Administration Adverse Reaction Reporting Program. With regard to those drugs where the human experience data submitted are based on Investigational Exemption for a New Drug (IND) or New Drug Application (NDA) data, the company must extract those data that are considered relevant to the request, and provide the Commission with a summary of these data. The entire NDA material itself need not be submitted.

B. Animal Toxicity Information. Although human experience data will be considered as the overriding criterion for considering requests for exemption, studies conducted in animals provide significant information with respect to the pharmacology and toxicology of various substances. Such data are therefore of great importance in the overall evaluation of an exemption request. Data obtained in acute animal studies are of primary importance in evaluating exemption requests; however, summary laboratory reports of data obtained in sub-acute and chronic animal studies, in as much as they pertain to the absorption, distribution, metabolism and excretion of the substance in question, should also be submitted.

All animal studies submitted in support of exemption requests must be performed in conformity with good pharmacological and toxicological practice. The Commission considers, amongst other things, that such

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practice is indicated by submissions which provide the following types of information:

(1) Complete descriptions of protocols used in experimental animal studies and:

(2) Signed laboratory reports which include the following basic information:

a. an exact description of materials tested.

b. description of test animals employed in studies including number, age, weight and sex and nutritional state of animals.

c. dosage level(s) and number of animals tested per dosage level.

d. basis upon which dosage was administered (i.e. as salt or base).

e. route of administration and dosage volume.

f. appendices containing all raw data and any additional data generated subsequent to the completion of the original study (i.e. results of histopathological examinations, if performed).

Median lethal dosage (LD50) studies shall be conducted in both adult and weanling animals of the same species and preferably in more than one species. The sensitivity or tolerance of the test species to the substance, relative to humans, must be indicated. While this factor may not be readily apparent from initial pharmacologic or toxicologic studies, more advanced studies will normally reveal relative species sensitivity. The oral route of administration is considered the more appropriate for studies involving substances subject to regulations promulgated under the Poison Prevention Packaging Act of 1970.

While the Commission realizes that parenteral administration of certain substances is not always appropriate or feasible, such data, when available, should be submitted. Sufficient dosage levels as well as numbers of test animals per dosage level must be used to give statistical reliability to determined LD50 values.

In view of the fact that LD50 values in themselves do not necessarily reflect a true estimate of the overall toxic potential of a substance, LD50 determinations must include:

(1) LD50 value with 95 percent confidence limits.

(2) Slope determination for the dose response curve including 95 percent confidence limits.

(3) Description of the statistical method employed in the analysis of such data (with proper citation) as well as the statistical analysis itself.

The Commission notes that the use of a statistical method in the analysis of data which data do not fulfill the strict requirements of that statistic is unacceptable. Modifications of accepted statistical methods which have been published in the literature are acceptable to the Commission provided that a copy of the published work is submitted.

Acute toxicity studies normally involve a 7-14 day observation period. A seven day observation period is considered minimal by the Commission. Good pharmacological practice requires that test animals be observed closely for several hours following test substance administration and less frequently on subsequent test days. Surviving animals are necropsied at the end of the observation period and gross

pathological alterations noted. Documentation of non-lethal effects occurring during these observation periods is of value in interpreting and predicting toxic and pharmacologic effects which may occur in humans. Similarly lethal effects occurring at high dosage levels, mode of death (cardiac arrest/respiratory arrest), and time of death, while perhaps less definitive in the evaluation of an agent's toxicologic and pharmacologic profile, are important data which must be submitted in conjuntion with acute toxicity laboratory reports. Reports of gross necropsies performed upon surviving animals should be submitted, as well as results of necropsies performed upon animals succumbing to the test substance provided that such animals are examined prior to the onset of autolysis. Results of microscopic examinations, when indicated by the nature or results of an acute toxicity study, must also be submitted.

A summary of all technical data which the petitioner believes supports his request for exemption must be submitted.

C. Product Specifications. These should include a complete quantitative formula for the product including inert ingredients, diluents, and solvents. A listing of all physical forms or dosage forms (whichever is appropriate) in which the product is available should be included. With respect to the requirement for submission of a complete quantitative formula, petitioners should refer to Section 6 (Trade Secrets) under General Considerations.

D. Packaging Specifications. Material submitted relative to these criteria must include the following:

1. A description of the packaging currently in use for each form of the product. This should include the name of the manufacturer of the packaging and all specifications for the package.

2. A complete packaging description including any other carton or wrapping in which the product is offered to the consumer.

3. Description of each size in which each form of the product is offered, including physical form, color and flavoring.

4. An empty sample of each type and size of package used, and, in the case of drugs, a designation of those packages intended to be used in dispensing the product to the consumer for household use.

E. Labeling. The Commission requires that the firm submit a sample of the label and complete labeling for each size in which each form of the product is packaged. This should include the immediate container labeling, any package inserts and other carton or wrapping labeling in which the product is offered to the consumer. In the case of drugs, labeling on the outer carton or wrapping in which the product is offered to the retailer, and complete promotional information or advertising for the product which may appear in such sources as the Physician's Desk Reference should be submitted.

F. Marketing History. This dates from the year in which each form of the product was introduced onto the market. The total number of units of each form or strength and package size of the product distributed since introduction of the product must be submitted. In the case of drugs, the average prescription size for the product should also be indicated.

Dated:_____

Sadye E. Dunn
Secretary
Consumer Product Safety Commission

14. QUESTION

In its answer to question 42 of the Subcommittee's questionnaire, the Commission stated that it intended soon to publish for public comment a set of regulations regarding the retraction of inaccurate information published under any of the Acts administered by the CPSC. The Commission took this action in response to a GAO recommendation growing out of GAO's study of the Marlin Toy Products matter. When does the Commission intend to publish those regulations?

ANSWER

The Commission has not, as yet, established formal regulations or procedures for retracting inaccurate or misleading information issued by the Commission. The reason for the delay is that Section 6(b) of the Consumer Product Safety Act (15 U.S.C. 2055(b)) -- the section which requires the retraction of inaccurate or misleading information -- is the subject of a number of lawsuits as to its interpretation and application.

The major issue in two lawsuits (GTE Sylvania et.al. v. CPSC, et. al., 404 Fed Sup. 325 (on appeal); and Pierce and Stevens Chemical Corp. v. CPSC, Civil Action No. 75-410, (Dist. Ct. W. Dist N.Y.), is whether Section 6(b) was intended to apply to the disclosure of information made pursuant to a Freedom of Information request. The Commission's position is that Section 6(b) was intended to apply only to "affirmative" information disclosures by the Commission, e.g., news releases, and not to the disclosure of documents under the FOI Act. (This position was formally adopted by Commission vote on October 6, 1975.)

The issue in another case (Kaiser Aluminum and Chemical Corp. v. CPSC, et. al., Civil Action No. 76-44, U.S. Dist. Ct. (Del.)) is whether the Commission is required to retract information about a class of products, e.g., aluminum wiring, when the information releases do not identify an individual manufacturer or private labeler. It is the Commission's position that Section 6(b) does not apply in this type of situation.

The Commission is awaiting the outcome of the present litigation on Section 6(b) prior to issuing implementing regulations. It is expected that the courts will provide guidance as to both the interpretation and application of the section.

In the meantime, the Commission intends to comply with the requirements of Section 6(b) and furnish notice to a manufacturer whenever it affirmatively issues information about a product that will identify the manufacturer or private labeler. Likewise, the Commission will retract

information which it affirmatively discloses when it finds it is misleading or inaccurate. The retraction shall be "in a manner similar to that in which such disclosure was made" as required by Section 6(b).

15. QUESTION

The February 13, 1976 issue of Science magazine reported that, based on an erroneous report by the Consumer Product Safety Commission, several women had become fearful that their unborn children might have birth defects stemming from the mother's exposure to spray adhesives and that consequently they had unnecessarily had therapeutic abortions. What steps has the Commission taken to ensure that the information it disseminates, particularly information pertaining to such emotional issues as mutagenic or teratogenic hazards, is correct?

ANSWER

The question leaves an impression that the actions taken by the Commission in banning these products were premature and without adequate review by appropriate specialists or knowledgeable individuals. Let me elaborate and identify the individuals who were associated with the review of the data: Dr. Gary Flamm, at the time with the Food and Drug Administration and currently with the National Cancer Institute, is an authority in chemical mutagenesis, having written numerous papers on the subject, co-authored a book on chemical mutagenesis, and was an officer and counselor to the Environmental Mutagen Society. He consulted with members of his branch on genetic toxicology at FDA and obtained advice and counsel from acknowledged experts in the field. These individuals included Dr. Sidney Green, currently Chief of the Genetics Toxicology Branch, FDA; Dr. Errol Zeiger; and Dr. Vernon Mayer. In addition, discussions were held with Dr. Fred deSerres, Chief of the Mutagenesis Branch, National Institute of Environmental Health Sciences (NIEHS), and with Dr. Warren Nichols, a medically recognized authority in cytogenetics with the Institute of Medical Research in Camden, New Jersey. Also prior to the ban, discussions were held with Dr. Ernst Freeze, then President of the Environmental Mutagen Society and Dr. Seymour Abrahamson, an internationally renowned geneticist with the University of Wisconsin. In these extensive, in-depth conversations in which all preliminary evidence known was reported in a factual way, there was no indication or hint that any individual opposed the action which was to be taken by the Consumer Product Safety Commission to ban aerosol spray adhesives.

The concerns of Dr. Seely (the physician primarily responsible for bringing the problem to the Commission's attention) were discussed with Dr. Robert W. Miller, Chief of the National Cancer Institute's Epidemiology Branch. Dr. Miller's remarks indicated that basically he did not believe that the aerosol spray adhesive was the culprit, because there were inconsistencies in the type of birth defects noted. At the time of this conversation, the Commission had not yet received Dr. Seely's

written report. Discussions were held with other experts who could be contacted to review this information. Some of these individuals were contacted by Dr. Flamm prior to the banning and later others were contacted to review the studies which were sponsored by the Commission and by other investigators. I believe the Commission acted carefully as well as decisively on the matter, given its mandate and its regulatory responsibility.

The Commission, sometime ago, recognized the need for evaluation of data and evidence involving not only mutagenic or teratogenic hazards, but also other situations involving all chemical and toxicological problems. Currently, a recommendation dealing with the establishment of an advisory committee on toxicology and chemistry has been formulated and is under review by the Commission. The purpose of such a committee would be to provide the Consumer Product Safety Commission with a useful source of expert advice relative to policy development and imminent hazard evaluation. Under the proposal, decisions and recommendations of the committee would be documented by appropriate records and reports.

In addition to a proposed advisory committee on toxicology and chemistry, procedures have been suggested by the Product Safety Advisory Council regarding consulting with the Council concerning alleged imminent hazards under Section 12 of the Consumer Product Safety Act. In July 1975, the Commission indicated it would attempt to use these procedures if time allows at such time as other hazard situations occur.

16. QUESTION

A study prepared by the Subcommittee staff from information submitted by the CPSC in response to the Subcommittee's questionnaire of last summer shows that more than half of the official appearances of the five Commissioners have been before industry groups, while only one fifth of the official appearances have been before groups that could be characterized as consumer groups. What efforts is the Commission making to ensure that the Commissioners' travels expose them to a diversity of persons and groups.

ANSWER

In the Commission staff's work with national organizations and associations, the attempt is made to: (1) inform the public about CPSC in general; (2) present the Commission's programs, particularly in the areas of regulatory development, compliance and enforcement, and information and education; and (3) develop plans for involvement of national organizations in the implementation of information and education programs. Groups are also advised of assistance (technical and otherwise) which is available through the Commission. This includes the availability of the Commissioners to speak or meet with them.

In the case of invitations extended in a general manner, i.e., not addressed to a specific Commissioner other than the Chairman, there is a Speakers Bureau within the Office of Public Affairs which coordinates these requests. The Speakers Bureau, when assigning speaking engagements, evaluates the audience size and visibility for CPSC; the usefulness of the attendees in informing the public about CPSC; presenting the Commission's programs (regulatory development, compliance and enforcement, information and education); and their involvement in the implementation of these programs.

For the most part, the Commissioners receive their invitations and determine their acceptances for speaking engagements through their own offices. In general, the Commissioners accept the invitations of consumer groups, but invitations from these groups are not numerous as compared to invitations from "industry groups" (Trade Associations, Better Business Bureaus, etc.) which are national or international in scope. Also, interest of consumer groups is more diversified, consumer product safety being only one of many concerns. Industry, on the other hand, is more concerned about CPSC and extends many invitations due to direct impact of the law.

17. QUESTION

The regulations implementing section 15 of the CPSA state that it is Commission policy "to enforce vigorously" the filing requirement imposed on manufacturers, distributors, and retailers by section 15(b). (16 CFR 1116.3(b). Furthermore, these regulations require that every staff investigation shall include a determination as to whether there has been a violation of the duty to file. (16 CFR 1116.6.)

a) What steps is the Commission taking to ensure that those subject to the filing requirement of section 15(b) are aware of their obligations?

ANSWER

A variety of methods are being used to insure that those subject to the requirements of section 15(b) are aware of their obligations to report, in a timely manner, information which they have gathered pertaining to a defect which could create a substantial hazard. During pre-section 15 investigations, the manufacturer, distributor or retailer is provided with copies of the Acts, the rules and regulations and specifically directed to the sections 15(b), 19(a)(4), 20, and 21. From time to time members of the Commission staff attend conferences, give speeches and generally inform manufacturers of their responsibilities to report that information pertaining to product defects when they reasonably come to the conclusion that such defect could create a substantial product hazard. In addition, the Bureau of Information and Education has developed a seminar for manufacturers, distributors, and retailers which concentrates on section 15 reporting requirements.

b) What other steps is the Commission taking to enforce vigorously the filing requirement?

ANSWER

Another step that the Commission has taken to alert manufacturers, distributors and retailers that the filing requirements will be vigorously enforced is informing those subject to section 15 that if the staff opens a case under 16 CFR 1116.4(b)(2), based on the tentative evaluation that a product could create a substantial hazard, the possibility for filing a voluntary notification of defect has then passed. The ability of the staff to open a case encourages manufacturers, distributors, and retailers to report voluntarily, in addition to the fact that the manufacturer,

distributors, or retailer will perhaps not be offered a voluntary Corrective Action Plan, but will rather have to choose between a Consent Agreement or section 15(f) hearing.

c) Are the staff investigations required by section 1116.6 consistently being carried out? Have they uncovered any violations of the filing requirement?

ANSWER

Since October 25, 1975, when 16 CFR 1116 became effective, the staff's major concern in carrying out that regulation has been using our limited resources to insure that substantially hazardous products are removed from the marketplace and from the hands of consumers as expeditiously as possible. Recently, guidelines have been sent to all the Area Offices to examine the timeliness of the report in every case since October 25. A report on every case since the new policy became effective has been requested and the staff is now reviewing those cases for possible violation of section 19(a)(4). The cases will then be forwarded to the Commission for action.

d) Have there been any enforcement actions against persons who violated the filing requirement of section 15(b)?

ANSWER

There is one enforcement action pending for violations of section 19(a)(4) of the CPSA, that of the Consolidated Cigar Butane Lighter.

18. QUESTION

An article which appeared in the September 1975 issue of The New Engineer entitled "Consumer Safety and the Botched Trouble Light Recall" alleged that the performance of the Commission's in-depth investigators may be inadequate.

a) Has the Commission made any evaluations of the adequacy of its procedures for in-depth investigations, and, if so, what have those evaluations indicated?

ANSWER

Yes. The Commission continuously evaluates its procedures for the conduct of in-depth investigations. The Commission order which establishes these procedures is generally reviewed twice yearly to assure that it takes into account the most up-to-date techniques and any changes in policy which may occur. Furthermore, investigative guides are issued periodically as needed to assist the investigator in obtaining very specific information on certain products where this information will make the investigation more complete and useful. This evaluation indicates that the procedure employed is adequate, and no problem has occurred when the procedure was followed.

b) Does the Commission have any program to monitor the performance of its in-depth investigators and their compliance with Commission procedures?

ANSWER

The Commission has a program for monitoring the quality of investigation reports. This program also includes a review of the performance of investigators and compliance with Commission procedures. To further improve the program, by mid-April 1976, first line field supervisors will be required to verify investigation information.

19. QUESTION

Has the Commission considered promulgating its own rules to assist in the implementation of its responsibilities under the National Environmental Policy Act, i.e., rules similar to those promulgated by the Food and Drug Administration at 21 CFR Part 6? If not, what was the basis for the Commission's determination? If so, when will these rules be published?

ANSWER

The Commission has under consideration a formal procedure for meeting the requirements of the National Environmental Protection Act. A final draft is currently being reviewed by staff and will be proposed for Commission action soon. These draft procedures have been used by the staff as a guide in preparing the environmental assessments that have been made.

20. QUESTION

Has the Commission considered promulgating any rules prescribing the circumstances under which a hearing will be granted in either a proceeding under section 15(b) of the CPSA or section 2(q) of the Federal Hazardous Substances Act? (The Food and Drug Administration has adopted so-called "summary judgment rules," 21 CFR 130.12(a)(5), setting out the circumstances under which an applicant will be granted a hearing under section 505(e) of the Federal Food, Drug, and Cosmetic Act in a proceeding for the withdrawal of a new drug application.) If the Commission has determined not to promulgate such rules, what is the basis for that determination? If the Commission has determined to promulgate rules, when will they be published?

ANSWER

Procedures for the issuance, amendment, or repeal of regulations under section 2(q)(1)(B) of the Federal Hazardous Substances Act (FHSA) are governed by section 701(e) of the Federal Food, Drug, and Cosmetic Act. This section provides that within 30 days following issuance of a regulation (which was begun by publication of a proposal and period for public comment) adversely affected persons may object to portions of the regulation, stating the grounds for their objections, and request a public hearing. Procedures for the conduct of these hearings were issued by FDA and published under Part 2 of Title 21, Code of Federal Regulations. These procedures, as in effect on May 14, 1973 (the date the transfer of functions under the FHSA from DHEW to CPSC became effective), are applicable to proceedings before the Commission under section 2(q)(1)(B) and will, according to section 30(e)(2) of the CPSA, remain in effect until "modified, terminated, superseded, set aside, or repealed by the Commission, by any court of competent jurisdiction, or by operation of law."

While these procedures do not contain a "summary judgment rule," they do provide that objections may not be accepted for filing if they are not, among other things, "supported by reasonable grounds which, if true, are adequate to justify the relief sought." 21 CFR 2.67. Thus, if objections are not considered by the Commission to be legally valid, they may not be accepted for filing by the Commission. If not accepted for filing, the regulation in question would not be stayed and the hearing would not be held unless a court overturns this Commission decision and orders the holding of a hearing. Commission regulations specifically issued by FDA under the FHSA and transferred to the Commission (now codified as 16 CFR 1500.201) also provide, more generally, for the rejection of objections that "fail to establish that

the objector will be adversely affected by the regulation, if the objections do not specify with particularity the provisions of the regulation to which objection is taken, or if the objections do not state reasonable grounds." Thus, even though "summary judgment rules" have not been issued, not all objections and requests for hearing will be accepted.

Although not actively under consideration, the issuance of summary judgment type rules under section 2(q)(1)(B) has not been ruled out. The decision will be affected by the outcome of pending litigation in the 9th Circuit regarding the Commission's decision not to file objections and hold a hearing on a regulation banning household products containing vinyl chloride (Pactra Industries, Inc. v. Consumer Product Safety Commission, No. 74-2902).

Section 15(b) of the CPSA requires manufacturers, distributors, and retailers of a consumer product who obtain information reasonably supporting the conclusion that one of their products fails to comply with an applicable consumer product safety rule or contains a defect which could create a substantial product hazard to immediately notify the Commission. The Commission published in the Federal Register of February 17, 1974 (39 FR 6061), a regulation establishing notification requirements to be followed by manufacturers, distributors and retailers of such products. Since manufacturers, distributors and retailers of products described in section 15(b) of the Act are required to report to the Commission, and hearings for such notification are not applicable, rules prescribing the circumstances under which a hearing would be granted have not been prescribed.

Under sections 15(c) and (d) of the CPSA, the Commission, if it determines that a consumer product presents a "substantial product hazard", is authorized to order the manufacturer, distributor, or retailer of the product to take certain remedial action. However, before the Commission can finally determine that a product presents a substantial product hazard and before it can "order" a manufacturer, distributor or retailer to take remedial action, the Commission is required by sections 15(c), (d), and (f) to afford interested persons an opportunity for a hearing. Section 15(f) of the Act specifies that an order under section 15(c) or (d) may be issued "only after an opportunity for a hearing in accordance with section 554 of Title 5, United States Code" (Section 554 of Title 5 describes formal, on-the-record adjudicative proceedings).

Thus, in any situation in which the Commission wishes to "order" a manufacturer to take remedial action under sections 15(c) or (d) of the Act, the Commission does not have the option of "granting" a

hearing under section 15(f). Unless a manufacturer, distributor, or retailer of a consumer product voluntarily agrees to take action requested by the Commission under section 15(c) or (d), a hearing under section 15(f) is a necessary prerequisite for an "order."

The Commission has published proposed and interim rules of practice at 39 FR 26848 (July 23, 1974) which apply to adjudicative proceedings under section 15(f) of the CPSA. The Commission has also published Policy and Procedures Regarding Substantial Product Hazards (40 FR 30937, July 24, 1975) which pertains to opening cases under section 15, procedures for initiating non-binding corrective action plans, consent agreements, and binding Commission orders.

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21. QUESTION

Just before Christmas of 1975 the Commission discontinued the highly successful banned toy list.

a) Why was the list discontinued?

ANSWER

The reasons for discontinuing the Banned Products List are summarized as follows:

1. The list had served its intended purpose in that agency surveillance and consumer volunteer programs had indicated that banned toys had essentially been eliminated from the market.

2. The banned toy list had in the past been incomplete and would always remain incomplete because it contained only those toys which CPSC had tested and found to violate toy safety regulations. CPSC does not have the authority or resources to pre-market or otherwise test all toys.

3. A toy not on the list was often incorrectly assumed to be safe. Our compliance checks confirmed that retailers were incorrectly relying on the list as a safe toy buying guide.

4. The list quickly became out-dated as banned toys were removed from the market, repaired, or safer models manufactured.

5. The Federal Hazardous Substances Act repurchase regulations (16 CFR 1500.202) promulgated in 1974, provide a more rapid method for removing banned products from the market than had previously existed.

b) On what date was the decision to discontinue the list made?

ANSWER

March 6, 1975.

c) On what date did you receive the NEISS report for FY 75 showing an increase over FY 73 of 21 percent in the number of toy-related injuries treated nationwide in hospital emergency rooms?

ANSWER

NEISS data for FY 75 became available in August 1975. The staff analysis which developed the 21% increase figure was made in November 1975. The analysis showed that fad toys not covered by regulations accounted for the bulk of the increase and that the increase was also related to an increase over the whole NEISS system resulting from improved reporting procedures.

d) Since NEISS reports only toy-related injuries treated in hospitals, what is the Commission's estimate of the number of toy-related injuries occurring each year that are not treated in hospitals?

ANSWER

Using a definition of injury which states that medical treatment was received or activities were impaired, a "Household Safety Study Summary Report" received in 1972 was used to determine that approximately 38 percent of product-related injuries are treated in hospital emergency rooms.

In FY 75, there were an estimated 173,000 toy-related injuries treated in U.S. hospital emergency rooms. If this figure represents 38 percent of all toy-related injuries, as defined, the number of toy-related injuries not treated in hospitals was approximately 282,000 for the same period.

e) Would legislation granting the CPSC authority to require pre-market clearance of toys curtail toy-related injuries?

ANSWER

It probably would. However, the evidence we have on toy-related injuries does not indicate that the risk of injury is so severe - as in the case of drugs, for example - to warrant such drastic and costly intervention in the market by the government.

f) What is your estimate of the cost to effectively implement such legislation?

ANSWER

We estimate that the cost of pre-market testing and clearance would be approximately $1,000 per toy.

If we tested and cleared the estimated 150,000 different toys on the market at the rate of 30,000 toys per year for five years, it would cost approximately $30 million per year. Subsequent to this initial period, testing and clearance of the estimated 5,000 new toy models entering the market each year would require an annual expenditure of $5 million.

g) CPSC staff has advised that the banned toy list resources were shifted to the monitoring of injuries related to Christmas tree lights. What were the nationwide statistics on injuries related to Christmas tree lights, both at the time the banned toy list was discontinued and now?

ANSWER

As a matter of clarification, we would assume that the shift in "resources" primarily refers to the use of consumer deputies to assist in surveying the marketplace for hazardous Christmas lights as opposed to the earlier banned toy surveillance programs.

The estimated injuries for Christmas tree lights are as follows:

Calendar Year	Estimated Number of Injuries
1973	457
1974	428
1975	464

It should be noted, however, that the primary consequences of hazards associated with defective Christmas tree lights are fires and electric shock, hazards more severe than those normally associated with toys. These two potential problems are such that they may not be reported through the emergency room reporting system used by NEISS. Other data sources have indicated that a fire problem does exist; not only are fires resulting in property damage not detected through NEISS, but injuries from these fires may not be traced to the source of the fire at the time of emergency room treatment.

h) What was the annual cost in appropriated funds to publish the banned toy list and what is the estimated annual cost in appropriated funds to implement the Christmas tree lights program?

ANSWER

Publication of the two issues of the Banned Products List which appeared during 1974 cost approximately $52,000. This figure includes the cost of compiling, editing, and publishing the lists which were used to support toy safety information and enforcement programs, especially during the pre-holiday season. Costs associated with, but not dependent upon publishing a Banned Products List (such as inspections and testing costs) are not included in this figure.

The estimated expenditure on the 1975 Christmas tree light program was $150,000. This figure includes the estimated costs of program development, inspectional activities, testing of samples and a consumer deputy program to provide information to retailers.

22. QUESTION

In February 1975, CPSC personnel attended the Toy Fair in New York and, according to your public statement, "came away with the view that tremendous strides have been made by the industry in dealing with the toy safety problem." Since these observations were apparently used as a basis for the decision to discontinue the banned toy list, provide the Subcommittee any analyses, reports, or other documented details furnished to you in support of the improvements noted at the fair.

ANSWER

Observation of the 1975 Toy Fair was only one factor which contributed to the assessment of the industry's progress in dealing with the safety problem. This progress has also been made evident by meetings and other contacts with the toy industry, testing of toys, surveillance of retail outlets and attendance at past Toy Fairs.

Copies of reports submitted by staff members who visited the 1975 Toy Fair are attached.

MAR 1 1 1975

Albert S. Discoff, Deputy Executive Director

Bert C. Simson, Technical Analysis Division, OSCA

Summary of New York Toy Fair Trip Reports

CPSC personnel observed the following exhibits during the February 17-19, 1975, New York Toy Fair:

American Toy Fair	200 Fifth Avenue 1107 Broadway Statler Hilton Hotel (Penn Plaza) 2 Pennsylvania Avenue
International Toy Fair International Cycle Show Variety Merchandise Show	New York Coliseum

The comments of seven individuals who attended the shows are attached. It appears that they adequately covered all areas relating to the Commission's programs.

Attachments

cc:
BEA: J. Fitcher
BES: T. Cooper,
J. Thurber,
T. Van Houten,
K. Edinger

bc:
Chron
ORU (2)
Signer/Preparer:BSimson:rab:3/7/75

UNITED STATES GOVERNMENT

Memorandum

U.S. CONSUMER PRODUCT SAFETY COMMISSION
WASHINGTON, D.C. 20207

DATE: MAR 5 1975

TO : Bert Simson, SCA

THROUGH: William W. Jones, Director
FROM : Donald T. Van Houten, BESP 3/4/75

SUBJECT: Toy Fair Trip Report

On February 18 and 19, the writer attended the American Toy Fair for the purpose of determining the current state of safety awareness within the toy industry. In carrying out this task, the major domestic toy producers displaying their products at the Fifth Avenue Building were visited.

In general, it may be said that domestic manufacturers are acutely aware of toy safety and have taken significant steps to ensure the integrity of their products. For the most part, high impact types of plastics are being utilized to resist impact fragmentation and the generation of sharp edges. Where CPSC criteria for hazards exist, such as test devices, those criteria are being used to screen product lines. This is being done irregardless of whether the criteria are in a draft stage or have been officially proposed in the Federal Register. In cases where non-complying products have been detected, manufacturers have made changes in molding equipment at substantial expense to the company. In addition to implementing compliance to the Commission's proposed safety regulations, the major toy manufacturers are attempting to conform to the TMA voluntary toy standard TS 215 which is similar, though more extensive, to the CPSC requirements.

The writer was rather surprised at seeing a considerable amount of age labeling which primarily was directed at warning consumers that the product was not intended for children under the age of 3. This apparently is a direct result of the Commission's proposed small parts regulation.

*U.S. GOVERNMENT PRINTING OFFICE: 1974 733-533/3604 1-3

It was also surprising that toys produced this year and contemplated for next year are rather complex in function and consist of multiple parts, each part requiring its own mold. The complexity of these products could result in a substantial economic problem for toy companies if changes are required as a result of CPSC requirements.

Most of the toy bannings of CPSC have concerned imported products and it was intended to visit the international toy fair at the New York Coliseum. However, prior commitments for Tuesday, the last day of the international fair, prevented the writer from attending.

UNITED STATES GOVERNMENT

Memorandum

U.S. CONSUMER PRODUCT
SAFETY COMMISSION
WASHINGTON, D.C. 20207

DATE: March 4, 1975

TO : Bert G. Simson, OSCA/TAD
THRU : Walter R. Hobby, Director, BEA
FROM : Judith M. Pitcher, BEA
Nancy Klisch, BEA

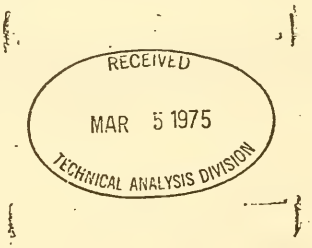
SUBJECT: New York Toy Fair Trip Report

We attended the New York Toy Fair to see the types of new toys that will be offered to consumers in 1975. This was to provide us with notions of what items were included in the classification "toys, games, and other articles intended for use by children."

Because of the short time we had at the fair and the length of time needed to view a manufacturer's line, we concentrated on the larger manufacturers whose sales represent the bulk of the toy sales. In the time remaining, we scanned the lines of some smaller companies.

We were shown through the following companies' exhibits:

Marx Toys	Playskool
Hasbro Industries	Tonka
Kenner (General Mills)	Block House
Mattel, Inc.	Processed Plastic Co.
Creative Playthings	



*U.S. GOVERNMENT PRINTING OFFICE: 1974 733-533/3604 1-3

UNITED STATES GOVERNMENT

Memorandum

U.S. CONSUMER PRODUCT SAFETY COMMISSION
WASHINGTON, D.C. 20207

TO : Bert Simson, OSCA

DATE: February 27, 1975

FROM : Tom Cooper, BESB Tom Cooper

SUBJECT: Toy Fair

On February 18 and 19, 1975, I attended the American Toy Fair in New York City. Guided visits were made with all but one of the following larger manufacturers.

Tuesday, February 18	10:30 a.m.-Marx (Bob Jennings Dick Hillegas)
	1:30 p.m. - Mattel
	3:30 p.m. - Hasbro (Gerald Bloom)
Wednesday, February 19	9:00 a.m. - Kenner (Karl Wojahn)
	10:30 a.m. - Gabriel
	11:30 a.m. - Nylint (unguided)

The remainder of my visit was spent viewing the exhibitions for smaller manufacturers located at the Toy Building (200 - 5th Avenue) the Statler-Hilton Hotel (7th Avenue & 33rd Street) and Pennsylvania Plaza (7th Avenue).

U.S. GOVERNMENT PRINTING OFFICE: 1974 733-533/3604 1-3

MEMORANDUM

CONSUMER PRODUCT SAFETY COMMISSION

DATE: 4 March 1975

TO : Burt Simpson, Standards Coordinator, OSCA/TAD

FROM: John Thurber, Division of Engineering Laboratory Operations

SUBJECT: Trip Report, New York Toy Fair

A visit was made to the New York Toy Fair on February 17, 18 and 19, 1975. In addition, the variety show and the bicycle show was also visited.

Specific comments with respect to specific manufacturers are difficult to make but possibly some general comments and impressions may be helpful.

Mattel, Hasbro, Tonka, Marx, Fisher-Price and Playskool were among the larger manufacturers visited. All expressed concern over the new regulations being promulgated by CPSC and how they would impact their company. My general impression was that most companies were cooperating and did, in fact, show concern with respect to toy safety.

Approximately three fourths of one day was spent walking through the Variety show at the Coliseum. This show displayed an extremely large quantity of products ranging from toys to perfume, including trinkets and many inexpensive gift items.

Approximately one half day was spent at the bicycle show at the Coliseum which was very impressive with respect to the number of bicycles and bicycle parts manufactured.

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UNITED STATES GOVERNMENT

Memorandum

U.S. CONSUMER PRODUCT SAFETY COMMISSION
WASHINGTON, D.C. 20207

DATE: MAR 5 1975

TO : Bert Simson,
THROUGH: William W. Jones, Director, BESP

FROM : Kenneth W. Edinger, BESP KWE

SUBJECT: Trip Report to Bicycle Fair in New York City on February 17, 1975.

The Bicycle Fair had exhibits from approximately 80 different bicycle manufacturers coming from 10 different countries. Numerous parts and accessory manufacturers were also represented.

There were many displays of the newly introduced Motocross Bicycle which is used by children for jumping, cross-country racing, and obstacle course racing. The bicycle manufacturers consider that the Motocross Bicycle will be one of their largest selling bicycles in the near future. It remains to be seen whether or not these bicycles, which presently appear to be ridden in controlled track races only, end up on the streets and roads.

Mopeds (motorized bicycles) were also widely displayed at the Bicycle Fair. Many of these I would consider to be in the small motorcycle class. From what I have learned from General Counsel, those Mopeds which can be licensed for use on the public roads and highways will be under the control of the state and Federal DOT. Those which do not fall into this category would be under the control of CPSC.

The bicycle manufacturers appear to have made considerable progress in eliminating sharp edges from many parts of the 1975 bicycles, although they are still concerned about parts that do not come directly in contact with the riders' arms or legs. In general, many of the bicycle manufacturers feel they already comply with the Bicycle Regulation as it was published on July 16, 1974. There is considerable controversy over the newly proposed chain guard requirements and the proposed effective date as they were promulgated on January 7, 1975.

*U.S. GOVERNMENT PRINTING OFFICE: 1974 733-533/3604 1-3

UNITED STATES GOVERNMENT

Memorandum

U.S. CONSUMER PRODUCT
SAFETY COMMISSION
WASHINGTON, D.C. 20207

TO : File

DATE: March 7, 1975

FROM : Bert G. Simson, Technical Analysis Division, OSCA

SUBJECT: Toy Fair, New York City, February 17-19, 1975

While attending the American Toy Fair in New York, the following toy exhibitions were observed:

Mattel
Marx
Hasbro
Kenner
Gabriel
Nylint
Ideal
Playschool

These manufacturers are among the largest in the toy industry, and they produce most of the toys on the market.

The visit to the fair was interesting and informative, in that it gave me an insight into the vast variety of products which could be affected by regulations promulgated by the Commission.

*U.S. GOVERNMENT PRINTING OFFICE: 1974 733-533/3604 1-3

23. QUESTION

Information provided by the CPSC staff stated that although toy-related injuries were increasing, there were no increases in injuries from toys regulated by the CPSC.

a) Were the 1500 toys banned since 1970 only regulated toys?

ANSWER

Under the Toy Safety Amendments to the Federal Hazardous Substances Act, any toy or article intended for use by children may be regulated by the Commission. Those that are toxic, corrosive, irritants, strong sensitizers, flammable, combustible, or which generate pressure through heat, decomposition or other means, and which may also cause substantial personal injury or illness, are banned automatically. Furthermore, any toy or article intended for use by children which is declared by regulation to present a thermal, electrical, or mechanical hazard is also a banned hazardous substance.

Of the 1500 banned toys, almost all were banned by the regulations dealing with thermal, electrical, or mechanical hazards (16 CFR 1500.18(a) 1-7). A small number of toys were toxic or flammable, and were banned automatically by section 2(q)(1)(A) of the Act.

b) How many of the present toy regulations were issued by the FDA prior to May 1973 when the CPSC assumed the responsibility?

ANSWER

The following eight regulations dealing with toys or children's articles were issued by the FDA prior to May 1973.

	CFR Reference (All found in Title 16)	Regulation
1.	1500.18(a)(1) and 1500.86(a)(1)	Certain Toy Rattles, Classification as Banned Hazardous Substances and exemptions
2.	1500.18(a)(2)	Certain Toys Having Noisemaking Components, Classification as Banned Hazardous Substances

CFR Reference (All found in Title 16)	Regulation
3. 1500.18(a)(3) and 1500.86(a)(2)	Certain Dolls and Stuffed Animals, Classification as Banned Hazardous Substances and exemptions
4. 1500.18(a)(4) and 1500.86(a)(3)	Lawn Darts, Classification as Banned Hazardous Substances and exemptions
5. 1500.18(a)(5)	Certain Caps and Toy Guns, Classification as Banned Hazardous Substances
6. 1500.18(a)(6) and 1500.86(a)(4)	Certain Baby Bouncers or Walker Jumpers, Classification as Banned Hazardous Substances and exemptions
7. 1500.18(a)(7) and 1500.86(a)(5)	Certain Clacker Balls, Classification as Banned Hazardous Substances and exemptions
8. 1500.18b	Certain Electrically Operated Toys and Other Electrically Operated Children's Articles, Classification as Banned Hazardous Substances
and	
1505	Requirements for Electrically Operated Toys and Other Electrically Operated Children's Articles

c) How many toy regulations have been issued since May 1973 by the CPSC?

ANSWER

The following four regulations dealing with toys or children's articles have been issued by CPSC since May 1973:

	CFR Reference (All found in Title 16)	Regulation
1.	1500.18(a)(13)	Certain Cribs, Classification as Banned Hazardous Substances
	and	
	1508.	Requirements for Cribs
2.	1500.50, 51, 52, 53	Test Methods for Simulating Use and Abuse of Toys, Games and Other Articles Intended for Use by Children
3.	1500.18(a)(12)	Certain Bicycles, Classification as Banned Hazardous Substances
	and	
	1512.	Requirements for Bicycles
4.	1500.18(a)(14)	Certain Non-Full Size Cribs, Classification as Banned Hazardous Substances
	and	
	1509	Requirements for Non-Full Size Cribs

d) Provide copies of all the toy regulations.

ANSWER

Copies of the toy regulations are attached. [This material is in the Subcommittee files.]

24. QUESTION

Budget information provided to the Subcommittee disclosed that the Commission requested $11,488 for FY 75 and $13,931 for FY 76 for "Hazard Analysis and Remedy."

a) Why was there a sharp decrease to $1,864 for this function in the FY 77 budget request?

ANSWER

The major factors responsible for the sharp difference between CPSC's budget requests to the Congress for Hazard Analysis and Remedy funds for 1975 and 1976, on the one hand, and for Hazard Strategy Analysis funds in 1977, on the other hand, are as follows:

First, much of the difference is due to a revision in program categories. Major changes were made in the CPSC program structure and in the calculation of costs by program when the 1977 CPSC budget request was prepared.

Two new programs, Hazard Strategy Analysis and Regulatory Development, were created in the place of the old Hazard Analysis and Remedy program. In addition, the program plans of each bureau and office were reexamined, resulting in a new distribution of funds and positions by program. Perhaps the largest reclassification of costs that occurred between the 1976 and 1977 budget requests was the consolidation of all ADP costs in the Administration program rather than the spread of ADP costs throughout Commission programs. As a result, figures for 1975 and 1976 contained in the 1975 and 1976 CPSC Requests to Congress cannot be directly compared to the 1977 figures contained in the 1977 Request to Congress.

Second, the Commission made no change from its budget requests to the OMB when it presented its budget requests to Congress for 1975 and 1976. In contrast, CPSC's 1977 justification of appropriations to the Congress reflects a downward change after considering the OMB guidance received after submission of the budget request. While the CPSC budget estimate for 1977 for Hazard Strategy Analysis differs from the President's estimate because of differences concerning the cost of the policy of continuing the Commission's 1975 level of effort, it does reflect a reduction from the Commission's original resource estimate to the OMB for Hazard Strategy Analysis.

Taken together, these two factors account for the difference in magnitude in this area between the 1975 and 1976 figures and the 1977 estimate.

b) Is the FY 77 request adequate? If not, why wasn't more requested?

A request for funds can be found adequate or inadequate only after a goal, workplan and timetable are agreed upon. CPSC presented to the OMB in September 1975 a budget request, including $4,098,000 for Hazard Strategy Analysis, which advanced the concept of a Commission with a finite mission and a predictable end point. The stated goal was a reduction in the level of hazards associated with unsafe consumer products to a point which would negate demand for a federal regulatory safety agency. This level, we predicted, would be reached at such time as we have 100 mandatory safety rules, complemented by voluntary standards. A budget level of $55 million in 1977, with the incremental increases proposed, would permit this to be achieved by 1982. At this point, the Commission would have addressed about 75% of the injuries preventable by standards, thereby reducing the overall problem to more reasonable levels - possibly enough to change the character of the agency to a maintenance of "enforcement only" level. Another alternative would be to abolish the agency. In short, we feel that the initial budget request to OMB was adequate to achieve this goal by 1982.

The $1,864,000 request contained in the Commission's 1977 budget request to the Congress is adequate to achieve the above goal over a much longer time frame. The 1977 request reflects the movement of five positions from compliance and enforcement efforts in the field to the Hazard Strategy Analysis Program in order to ensure that the best mix of resources is used.

Three budget estimates have been transmitted to the Congress: CPSC's original budget request tied to the seven year plan, CPSC's estimate of the cost of continuing the 1975 level of effort, and the President's budget estimate. Each estimate is adequate to accomplish certain things in certain time frames.

25. QUESTION

The White House Domestic Council Review Group on Regulatory Reform, co-chaired by Messrs. MacAvoy and Schmults, has been widely publicized for its role in coordinating the various efforts and providing the inspiration for regulatory changes in Federal agencies.

a) Does the CPSC have a continuing dialogue with and provide input to this group?

ANSWER

The CPSC does not have any dialogue with this group, to the best of my knowledge.

b) Furnish the dates, subject matter, and results of any contacts or meetings between this group and any Commission personnel.

ANSWER

I, as Chairman, have had no meetings or contacts with this group, and have seen none noted on the public calendar.

QUESTION #31 [June 25, 1975 Questionnaire]

Summarize from operating and statistical data, for each of the past five fiscal years:

(a) the time required for disposal of the average agency proceeding in the various categories of proceedings handled (agency proceeding in the questionnaire is as defined in the Administrative Procedure Act).

(b) the approximate average length of hearing records in such proceedings.

ANSWER

(a) The agency proceedings pertinent to the Consumer Product Safety Commission are the development of regulations, processing of petitions, and enforcement of its regulations. The average times of these proceedings are listed below:

REGULATORY PROCEEDINGS

FISCAL YEAR	NUMBER COMPLETED	AVERAGE DISPOSAL TIME (DAYS)	TIME FANGE (DAYS)
FY 74	16	351*	24-671
FY 75	9	484*	71-978
FY 76 (to 1/31/76)	5	301	127-486

PETITIONS

FISCAL YEAR	NUMBER COMPLETED	AVERAGE DISPOSAL TIME (DAYS)	TIME RANGE (DAYS)
FY 74	74	69*	1-221
FY 75	62	166*	3-454
FY 76 (to 1/31/76)	31	352	22-756

ADJUDICATIVE PROCEEDINGS REFERRED TO ADMINISTRATIVE LAW JUDGES**

FISCAL YEAR	NUMBER	AVERAGE TIME OF DISPOSAL (DAYS)
FY 74	2	95
FY 75	1	99
FY 76 (to 1/31/76)	19	330

SUBSTANTIAL HAZARD PROCEEDINGS (SECTION 15)

FISCAL YEAR	NUMBER	AVERAGE TIME OF DISPOSAL (DAYS)
FY 74	147	approx. 180
FY 75	124	approx. 180
FY 76 (to 1/31/76)	98	approx. 180

(b) Average length of transcript where hearings were conducted in relation to the above proceedings:

FISCAL YEAR	NUMBER OF HEARINGS	AVERAGE LENGTH OF TRANSCRIPT (PAGES)
FY 74	8	341
FY 75	24	240
FY 76 (to 1/31/76)	20	85

*Figures include both CPSC time and predecessor agency time involved in the disposal of proceedings.

**Time reported is from date of Notice of Enforcement to Final Disposition.

QUESTION #35 [June 25, 1975 Questionnaire]

By major category, list the oldest 20 agency proceedings currently before your Commission by date, subject matter and petitioner or affected party. Describe current status.

ANSWER

The Commission's oldest proceedings are those which were inherited from predecessor agencies under the transferred acts; all initiated prior to May 14, 1973. The particular safety rule developments listed in the attached tables were selected on the basis that a notice instituting the proceeding had been published in the Federal Register and, therefore, additional action is required. These proceedings have not been completed for a number of reasons. In some instances actions were permitted to lie dormant because of the press of higher priority work associated with the Consumer Product Safety Act. In others, the complex nature of the proceeding has required additional information to permit the development of reasonable and appropriate requirements. In the 2-1/2 years since the Commission was established, the levels of risk associated with some of these products apparently have been reduced sufficiently to warrant withdrawal of the proceedings. In these instances, as indicated in the attached table, notices of withdrawal will be published. The proceedings are broken out into two broad categories: COMPLIANCE ACTIVITIES and SAFETY RULES.

COMPLIANCE ACTIVITIES (all cases prior to 5/14/73)

ACT	SUBJECT MATTER	AFFECTED PEOPLE	STATUS
FFA	18 carpet manufacturers found in alleged violation of FF 1-70	Carpet Manufacturers	Commission decided to close 10 of 18 cases and voted to either litigate or accept consent orders on the remaining 8 cases.

SAFETY RULES

ACT	SUBJECT MATTER	AFFECTED PEOPLE	STATUS
FFA	Amendment to the Carpets and Rug Flammability Standards FF 1-70 and FF 2-70 to provide for Sampling Plans	Carpet and Rug Industry	Proposed sampling plans published in Federal Register 3/7/73. Comments have been analyzed and final sampling plans being prepared for Commission decision.
FFA	Flammability of Upholstered Furniture	Upholstered Furniture Industry	Notice of need published in Federal Register 11/29/72. Commission is evaluating voluntary industry efforts while continuing work on a possible mandatory standard.
FFA	Flammability of Blankets	Blanket Industry	Notice of possible need published in Federal Register 6/10/70. Industry voluntarily withdrew hazardous blankets. Staff is currently processing a petition involving blankets and electric blankets.
PPPA	Special Packaging of promotional samples	Advertising Industry, all industries utilizing promotional samples	Proposed regulation published in Federal Register 2/9/73. Proposal for withdrawal in preparation.
FHSA	Hazardous Substances Marketed in Containers Identifiable as Food, Drug or Cosmetic Containers	Household Chemical Industry	Proposed regulation published in Federal Register 11/10/72. Withdrawal notice being prepared.
FHSA	Pacifiers	Pacifier Industry	Proposed regulation published on 10/18/72. Commission staff is recommending withdrawal because of limited hazard information and industry's apparent voluntary efforts.
FHSA	Small Parts in Toys	Toy Industry	Proposed Regulation published in Federal Register 10/18/72. Additional injury data collection and evaluation of industry comments is in progress.

SAFETY RULES

ACT	SAFETY MATTER	AFFECTED PEOPLE	STATUS
FHSA	Glass in Toys	Toy Industry	Proposed regulation published in Federal Register 4/13/73. Probably will be withdrawn because Small Parts regulation will cover problem, or may be combined in contemplated regulations dealing with nonmetal materials.
FFA	Notice of Possible Need for Wearing Apparel	Fabric and Garment Procedures	Notice of need published in Federal Register 10/23/68. Commission is evaluating a National Bureau of Standard draft for a proposed regulation.
FHSA	Use of Combustible Solids in Consumer products	All industries	Proposed regulation published in Federal Register 8/18/70. Comprehensive program on flammability regulations under FHSA being prepared.
FHSA	Use of Combustible Liquids	Pressurized Can Industry	Proposed regulation published in Federal Register 8/18/70. Comprehensive program on flammability regulations under FHSA being prepared.
FHSA	First Aid Labeling of consumer products with petroleum distillates or other caustic substances.	Household Chemical Industry	Proposed regulation published in Federal Register 6/8/71. Rule in development.
FHSA	Ingestion of dolls, stuffed animals	Toy Industry	Proposed rule published in Federal Register 10/14/71. Probably will be withdrawn because problem covered by Small Parts.
FHSA	Testing procedures for eye irritants	Consumer Chemical Industry	Proposed regulation published in Federal Register 4/28/72. Being held pending additional research results.
FHSA	Revisions to test procedure for skin irritants	Consumer Chemical Industry	Proposed regulation published in Federal Register 12/19/72. Being held pending additional research results.

Question #55 [June 25, 1975 Questionnaire]

Identify any continuing and ad hoc boards, panels, and committees advising your Commission on its substantive and administrative activities whose membership includes non-agency personnel. Describe briefly the origin and special functions of each such advisory group. List all reports showing recommendations, prepared by such advisory groups for consideration by the members of your Commission (last five fiscal years). Show Commission action or other disposition of those recommendations. State when and why any of your advisory groups was either established or disbanded, in the last five fiscal years. Describe the frequency with which these bodies met in the last five fiscal years. Describe how such bodies are provided staff assistance.

[The following was received in response to the Subcommittee's June 25, 1975 Questionnaire:]

Answer.

Our understanding of Question #55 is that it relates to groups expected to exercise initiative in defining broad problem areas and in bringing diverse backgrounds and expertise to bear on such defined problem areas with the aim of providing general guidance to the Commission, but not in developing specific possible solutions to specific problems. Therefore, certain groups with whom CPSC has had interactions, even some brought together at CPSC initiative, have not been included in the following listing. Chief among the not listed groups are the offerors accepted under Section 7 of the CPSA. Although each accepted offeror convenes a committee or panel for the development of a recommended draft standard, the Section 7 Notice inviting offers has so spelled out the specifics of the problem (product category, hazard data, pertinent parameters, etc.) that the offeror is functioning more like a contractor than like an advisory group. Similarly, CPSC has interacted with groups in the national and international voluntary standards organizations, such as ISO, ANSI, ASTM, NFPA, etc., but again on fairly specific test development problems rather than to gain recommendations on broad subjects as mentioned above. Consequently, such groups have not been mentioned in the response to this question.

I. Statutory (Continuing) Committees

The Consumer Product Safety Commission utilizes the following advisory committees on a continuing basis: (a) Product Safety Advisory Council; (b) Technical Advisory Committee on Poison Prevention Packaging; and (c) National Advisory Committee on the Flammable Fabrics Act. The committees are comprised of non-agency personnel and provide advice and recommendations to the Commission on regulatory and policy matters.

The continuing committees advising the Commission have provided diverse viewpoints on Commission matters from their individual perspectives as representatives of the consuming public, industry, and/or government, rather than preparing special group reports. Their individual opinions are taken into consideration by the Com-

mission at the time a decision is made on the related matter. Advice on substantive policy issues and/or proposed rules and regulations is provided primarily at committee meetings; in many instances, individual members submit written comments and recommendations.

Management of the CPSC Advisory Committees is under the general direction of the Office of the Secretary, with specific responsibilities for managing, staffing, maintenance of records, etc., assigned to the Advisory Committee Management Officer. The Bureau of Biomedical Science provides technical assistance to the Technical Advisory Committee on Poison Prevention Packaging and the Office of Standards Coordination and Appraisal provides technical assistance to the National Advisory Committee for the Flammable Fabrics Act.

The following describes briefly the origin, functions, recommendations, and frequency of meetings for each committee.

A. Product Safety Advisory Council

Section 28 of the CPSA (PL 92-573) provides for the establishment of a 15-member panel to be called the Product Safety Advisory Council and representing equally the consuming public, government, and industry. The Advisory Council was activated in January 1974, with the first 15 members selected and appointed by the Commission to serve on this Council.

The Council functions in an advisory capacity providing the Commission with diverse viewpoints on major policy issues, proposed rules, standards or approaches to special problems and issues related to the safety of consumer products. The Commission's utilization of the Advisory Council has emphasized broad policy issues more than specific rule-making procedures. For example, the Commission solicited their opinions on such matters as public participation in the standards development process, and other Commission activities; abuse and misuse of consumer products; use of volunteers in the Consumer Deputy Program; consumer education aimed at meeting the needs of special groups, i.e., low-income, Spanish-speaking, elderly, etc.; participation and membership by Commission staff in voluntary standards organizations; and the inclusion of sampling plans in safety standards. Additionally, broad philosophical issues such as "How safe is safe?" and "What price safety?" formed the nucleus for Council deliberations and interchange with the Commission. Regulatory matters on which the Council advised the Commission include record-keeping regulations (proposed 9/3/74) and toy testing regulations (proposed 1/7/75).

Since its establishment in January 1974, the Advisory Council has held eight meetings. Future meetings will be held quarterly.

B. Technical Advisory Committee on Poison Prevention Packaging

The Technical Advisory Committee was established in April 1971 by the Secretary of Health, Education and Welfare pursuant to the provisions of Section 6 of the Poison Prevention Packaging Act of 1970 (PL 91-601). The administration and implementation of this Act, including the use and management of the Technical Advisory Committee, were transferred to the CPSC under the authority of Section 30(a) of CPSA (PL 92-573) effective May 14, 1973.

The Commission consults with the Committee in making findings and establishing standards for the special packaging of household products in order to protect children from serious personal injury or illness as a result of handling, using, or ingesting a substance.

An important function performed by this committee is the review and evaluation of petitions requesting exemption from the Poison Prevention Packaging regulations. The recommendations of individual committee members on such petitions are utilized by the Commission in the decision-making process.

Since May 1971, the Committee has held 13 meetings; and future meetings are scheduled to be held every three months.

The Committee has advised the Commission or its predecessor agency, DHEW, on the following substantive matters:

1. A testing protocol for determining compliance with special packaging standards - Regulation issued on November 20, 1971; effective January 20, 1972.

2. Special packaging standards which are now final on the following substances:

   (a) Aspirin - effective 8-14-72

   (b) Furniture polish - effective 9-13-72

   (c) Methyl salicylate - effective 9-21-72

   (d) Controlled drugs - effective 10-24-72

   (e) Turpentine - effective 4-11-73

   (f) Methyl alcohol - effective 4-11-73

   (g) Liquid and solid lye preparations - effective 4-11-73

   (h) Sulfuric acid - effective 8-14-73

(i) Illuminating and kindling preparations - effective 10-29-73

(j) Human oral prescription drugs - effective 4-16-74

(k) Ethylene glycol - effective 6-1-74

3. Labeling requirements for noncomplying packages - effective 1-31-75

4. Petitions for exemption to the Human Oral Prescription Drug Regulation

	Drug	Petition No. (PP-)	Commission Action	Date
1.	Sorbitrate	73-3	petition granted	8/73
2.	Erythromycin	74-2	exemption proposed	2/11/74
3.	Choloxin	74-3	petition denied	1/16/74
4.	Syntroid	74-4	petition denied	1/16/74
5.	Norlestrin, Loestrin	74-5	exemption proposed	2/11/74
6.	Questran	74-17	exemption proposed	2/11/74
7.	K-Lyte	74-18	exemption proposed	2/11/74
8.	Oracon, et al.	74-19	exemption proposed	2/11/74
9.	Compocillin	74-20	petition denied	4/19/74
10.	Norinyl, et al.	74-21	exemption proposed	2/11/74
11.	Ovral, et al.	74-22	exemption proposed	2/11/74
12.	Klorvess	74-24	exemption proposed	2/11/74
13.	Ortho-Novum, et al.	74-28	exemption proposed	2/11/74
14.	Aspirin	74-29	petition denied	11/21/74
15.	Luride, et al.	74-30	petition granted	6/20/74
16.	Antiminth	74-31	petition denied	8/1/74
17.	Bicillin, et al.	74-32	petition denied	8/30/74
18.	Enovid, et al.	74-33	exemption proposed	2/11/74

	Drug	Petition No. (PP-)	Commission Action	Date
19.	Organidin	74-34	pending - more data requested	
20.	Haldol	74-37	petition denied	8/8/74
21.	K-Lyte/Cl Powder	74-38	pending	
22.	Oratrol	74-39	petition denied	3/28/74
23.	Ogen	74-40	petition granted	10/24/74
24.	Colestid	74-41	petition denied	6/5/75
25.	Kaochlor, et al.	74-42	pending	
26.	Vi Penta F Drops	74-43	pending	
27.	Bilopaque, Telepaque	74-44 74-45	pending	
28.	3 Penicillins	74-46	petition denied	8/20/74
29.	4 Penicillins	74-47	petition denied	8/30/74
30.	K-Lor	74-48	pending	
31.	Celestone	75-1	pending	
32.	Vermox	75-2	petition denied	6/2/75
33.	Achromycin, Decloy-mycin, et al.	75-4,5	pending	
34.	Kay Ciel	75-11	pending	
35.	Mandelamine	75-12	pending	
36.	Signasul	75-13	pending	
37.	Nilstat	75-6	pending	

5. Proposed special packaging standards for the following products:

   (a) Pesticides - proposed 9/14/72

   (b) Paint solvents - proposed 2/9/73

   (c) Promotionally-distributed samples - proposed 2/9/73

   (d) Iron-containing preparations - proposed 1/16/75

C. National Advisory Committee for the Flammable Fabrics Act

The National Advisory Committee was established in December 1968 by the Secretary of Commerce pursuant to the provisions of Section 17 of the Flammable Fabrics Act, as amended (PL 90-189). The administration and implementation of this Act, including the use and management of the Advisory Committee, were transferred to the CPSC under the authority of section 30(b) of the CPSA (PL 92-573) effective May 1973.

The National Advisory Committee provides advice and recommendations on proposed flammability standards prior to final promulgation by the Commission. A tabulation of flammability standards reviewed by the Committee and promulgated either by FTC or CPSC as final include the following:

Carpets and Rugs, DOC FF 1-70 (FTC)

Small Carpets and Rugs, DOC FF 2-70 (FTC)

Children's Sleepwear, Sizes 0-6X, as amended, DOC FF 3-71 (FTC, CPSC)

Mattresses, FF 4-72 (FTC)

Children's Sleepwear, Sizes 7-14, FF 5-74 (CPSC)

Additionally, the Committeee has commented on various aspects of the Commission's ongoing activities in the implementation of the Flammable Fabrics Act. Such activities cover labeling of apparel and household textile products, proposed amendments to the mattress flammability standard, upholstered furniture, and general wearing apparel.

Commission Action

Upon completion of a review of all the information available, including the ad hoc committee comments, the Commissioners voted on January 18, 1974, to announce their intent to withdraw the aerosol spray adhesive on March 1, 1974. The reason for allowing an interim between January 18 and March was to permit any interested parties time to make other information available or comment on the proposed action. Withdrawal of the ban became effective March 1, 1974.

Frequency of Meetings

The ad hoc committee was not convened at any time or place. All communications were by mail or telephone conversation.

Staff Assistance

The staff of the Commission prepared, gathered, collated and mailed or delivered all materials that were to be reviewed by the ad hoc committee.

B. National Academy of Science ad hoc Committee to Evaluate the Hazard of Lead in Paint (March 22, 1973)

Origin

The National Academy of Science was requested, on March 22, 1973, to convene an ad hoc committee to advise the Commission whether or not there was sufficient scientific evidence to support the reduction of the lead content of consumer paints from 0.5 percent to 0.06 percent.

Special Function

The Committee was also requested, "If it was found that sufficient scientific evidence did not exist to support such a reduction, to recommend research that should be undertaken to obtain the required information."

Reports and Recommendations

The final Report of the NAS ad hoc Committee to Evaluate the Hazard of Lead in Paint was submitted to the Commission on November 7, 1973. The input indicated there was insufficient scientific data available to support a regulatory position at a lower level than 0.5 percent lead in paint. It was recommended that further research be conducted. One of the recommendations of this ad hoc committee was that the Commission conduct comparative studies on the absorption of lead from the normal diet and various paints and driers through the gastro-intestinal tract of suitable experimental animals.

During the past 5 years, the Committee has held a total of 13 meetings; 9 under the Department of Commerce and 4 under the CPSC. Future meetings will be held quarterly.

II. Ad Hoc Committees, Panels, etc.

A. Aerosol Spray Adhesives

Origin and Establishment

In August 1973, the Commission moved to ban spray adhesives from the marketplace pending further corroborative research. This action was taken based on available data which suggested a causal relationship between exposure to spray adhesives and chromosome damage and birth defects.

An Ad Hoc Committee was established in December 1973, to review and evaluate the results of the research conducted over a three-month period, and recommend a course of action to the Commission.

Special Functions

The Committee members were to respond to a series of questions (50), but, basically, the Commission sought guidance and a possible course of action to the following:

> "After reviewing the information supplied, and based on your own personal experience and knowledge of the subject area, do you believe the CPSC should lift its ban on the aerosol spray adhesives? Or what course of action do you recommend or propose that the Commission pursue?"

Reports and Recommendations

The Committee members believed that the conclusions as derived by the original research on which the ban was based were not corroborated and that the research data failed to establish a relationship between spray adhesive use and chromosome damage. Most of the Committee representatives did not believe the relationship between adhesive use and birth defects was adequately documented.

The Committee's consensus was that the Commission should withdraw the ban and they suggested performing additional research after withdrawing the ban.

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Commission Action

Consistent with, but prior to, receipt of this recommendation, a contract was negotiated with the New York Institute of Environmental Medicine, on November 1, 1972, to investigate the effects, in the baboon, of a paint film formulated with the most commonly used lead drier (lead octoate) and a soluble lead salt (lead acetate). A contract was negotiated, effective March 1, 1974, with the Southwest Foundation for Research and Education. This study was designed to determine the effects, in baboons, of various concentrations of lead in paint formulated with the two most commonly used lead driers, lead octoate and lead naphthenate. A standard dose of a soluble lead salt (lead acetate) was studied for comparative purposes.

Established - When and Why

This ad hoc committee was established on March 22, 1973, to advise the Commission on the sufficiency of scientific evidence to support the quantity of lead in paint, i.e., reduction from 0.5 to 0.06 percent.

The Committee's charge was complete upon submission of its report.

Frequency of Meetings

The NAS ad hoc committee met in Washington, D.C., on April 5, 1973, and on May 25, 1973.

Staff Assistance

Staff assistance was limited to submission of a history of regulations limiting the lead content of paint to the Committee.

C. National Academy of Science/National Research Council Committee on Toxicology (September 1974)

Origin

On September 19, 1974, the Commission negotiated a contract with the National Academy of Science Advisory Center on Toxicology.

Special Functions

The Committee on Toxicology is to organize and convene a series of panels and sub-panels to perform the following tasks:

1. Evaluate toxicity test procedures as mutually agreed to by the NAS and CPSC Project Officer during the period of performance for their reliability and applicability to the goals of CPSC.

2. In conjunction with the evaluation specified in #1 above, recommend, where possible, toxicity testing procedures for consumer products which may be adopted by CPSC as official procedures for toxicity testing.

3. Update and expand NAS/NRC Publication "1138 Principles for Evaluating the Toxicity of Household Substances." The updating and expansion should be suitable for CPSC applicability. Twenty-five copies of the revised version are to be delivered to CPSC.

4. Perform toxicity evaluations on specific chemicals relating to CPSC responsibilities. Chemicals to be evaluated will be specified in writing and will contain specific instructions for the information required, including any reporting requirements. This will be a quick response function.

The National Academy of Science Advisory Center on Toxicology was requested on October 3, 1974, under task 4 of this contract to convene an ad hoc committee to: a) review lead in paint studies sponsored by the Commission and by other groups, and b) to evaluate, on the basis of this research, a "safe level" of lead in paints and other similar surface coating materials.

Reports and Recommendations

In preparation.

Commission Action

Not applicable pending receipt of report.

Established - When and Why

Negotiated contract to perform the tasks as described under section on "Origin." Contract in progress to perform additional tasks.

Frequency of Meetings

This Committee met twice in Washington, D.C.; first on December 13-14, 1974, and again on February 6-7, 1975.

Staff Assistance

Staff assistance consists of supplying the following documents to the Committee:

1. Copies of the final draft reports of the studies sponsored by the Commission at New York Institute of Environmental Medicine and Southwest Foundation for Research and Education.

2. The final report of the study sponsored by the National Paint and Coatings Association at Midwest Research Institute.

3. The interim report of the study sponsored by the Division of Environmental Health Services, CDC, DHEW, at St. Mary's Children's Hospital, London, England.

4. Other additional reports and information as requested.

D. American Academy of Pediatrics (December 1974)

On December 4, 1974, the Commission requested the views of the American Academy of Pediatrics relating to the lead in paint studies sponsored by the Commission in compliance with the mandate contained in section 301(b) of the Lead Based Paint Poisoning Prevention Act, as amended 1973. The views of the Academy were submitted to the Commission on February 19, 1975.

Due to the late submission of the Academy's views, the Chairman was unable to incorporate them into the December 23, 1974, Report to Congress.

Staff assistance was limited to mailing copies of the draft final report of the lead in paint studies sponsored by the Commission, and the reports of the studies sponsored by others.

E. National Academy of Science/National Materials Advisory Board Ad Hoc Committee on Fire Safety of Polymeric Materials

Origin

The National Materials Advisory Board (NMAB), a unit under the National Academy of Science, set up the subject Committee to carry out a task under a continuing study contract with DOD/NASA but, before the Committee was assemble, NMAB decided to enlarge the scope of sponsorship and approached a number of other Federal agencies, including CPSC, as potential cosponsors. CPSC became one of ten additional cosponsors.

Special Functions

The Committee is composed of recognized individuals knowledgeable in the subjects, none of whom are in the employ of the sponsoring agencies. Each sponsoring agency was invited to provide one or more representatives in a non-voting liaison role.

The Committee will study the subject and prepare a series of several volumes as their report. Some of the volumes are on basic subjects, such as materials, and others are to be on applications, but none are to be specifically directed to this Commission or to the subject of consumer products.

The Commission provided a liaison observer at four meetings of the Ad Hoc Committee, but withdrew from further attendance in November 1974, with the establishment of CPSC policy against participation in or attendance at closed meetings.

Reports, Recommendations, and Commission Actions

As of November 1974, the Ad Hoc Committee planned to issue its report in the following volumes:

1. State of the Art Polymers, Additives, Retardants, Reinforcements; with Conclusions and Recommendations
2. Test Methods, Specifications, Standards, Glossary
3. Smoke and Toxicity - Special Problems
4. Fire Dynamics and Scenarios - Methodology; with Conclusions and Recommendations
5. Design Guidelines
6. Aircraft - Military and Civil
7. Buildings - Residential
8. Buildings - Nonresidential
9. Buildings - Custodial
10. Vehicles - Rail
11. Vehicles - Untracked
12. Vehicles - Ships
13. Mines and Bunkers

14. Submarines (report will be classified)

15. Open Road - Tents, Recreational Vehicles, Mobile Homes

Although several of these volumes are understood to be in various stages of preparation, this Commission has not received any final report volumes. Drafts of one volume and several other chapters have been received for review and comment, but CPSC has refrained from all participation because the Ad Hoc Committee continues to operate through closed meetings.

CPSC became a cosponsor because the overall report should prove to be in the public interest, and, particularly volumes 1 through 5, would be valuable background documents for CPSC in its work. However, CPSC has not received, and does not expect to receive, specific recommendations for action.

Why Participation Was Established and Terminated

As just indicated, CPSC became a cosponsor in the expectation that the report will be of value to the public and to CPSC. Participation as non-voting liaison was terminated with the establishment of CPSC policy against participation in or attendance at closed meetings.

Frequency of Meetings

The CPSC liaison representative attended meetings on June 16-17, 1973; September 24-27, 1973; November 27-29, 1973; and October 2-3, 1974; and missed one or more meetings in that period. As of October 1974, additional meetings were tentatively scheduled in calendar 1975 at approximately two month intervals but that schedule may have been altered.

Staff Assistance

Staff assistance to the Ad Hoc Committee was provided by the staff of the National Academy of Science, National Materials Advisory Board, using funds provided by the several sponsors.

F. Task Force on Inadvertent Modification of the Stratosphere (IMOS)

Origin

The first scientific report expressing concern over possible significant reductions in stratospheric ozone from fluorocarbon releases to the environment was published in June 1974.

Since then, various scientific, legislative, and other private and public bodies have expressed similar concern.

In January 1975, the Council on Environmental Quality (CEQ) and the Federal Council for Science and Technology (FCST) jointly created the Federal Interagency Task Force on Inadvertent Modification of the Stratosphere (IMOS).

Special Functions

The area of study for the group, as reflected in its title, is all potential sources of stratospheric modifications from human activities. Its initial charge, however, was to conduct an intensive study of the fluorocarbon-ozone question within several months.

Reports and Recommendations

1. The task force has concluded that fluorocarbons released to the environment are a legitimate cause for concern. It has also concluded that unless new scientific evidence is found to remove the cause for concern, it would seem necessary to restrict uses of fluorocarbons 11 and 12 to replacement of fluids in existing refrigeration and air-conditioning equipment and to closed recycled systems or other uses not involving release to the atmosphere.

2. The National Academy of Sciences is currently conducting an in-depth scientific study of man-made impacts on the stratosphere and will report in less than a year. If the National Academy of Sciences confirms the current task force assessment, the task force recommends that the Federal regulatory agencies initiate rule-making procedures for implementing regulations to restrict fluorocarbon uses. Such restrictions could reasonably be effective by January 1978 - a date that, given the concern expressed now, should allow time for consideration of further research results and for the affected industries and consumers to initiate adjustments.

3. Other conclusions and recommendations of the task force relate to the expected effects of any reduction in the average ozone concentration in the stratosphere; the need for labeling of aerosol products containing fluorocarbons; the present federal authorities under which various regulatory actions could be initiated; the need for toxic substances control legislation; the need for international cooperation; and the federal research program for addressing the scientific and socio-economic issues.

Commission Action

The Commission denied the petition (regarding the ban of aerosol products) without prejudice.

Established - When and Why

The task force was formed in January 1975 to study the possible effects of fluorocarbons and the environment.

Following are dates of meetings:

February 27, 1975	April 30, 1975
March 12, 1975	May 12, 1975
April 1, 1975	May 21, 1975
April 16, 1975	June 25, 1975

Staff Assistance

The staff members attended the meetings and reviewed the reports.

G. Technical Consultant Panel on the Sample Design of the National Electronic Injury Surveillance System (NEISS) (October 1974)

Origin

The Bureau of Epidemiology, CPSC, determined the need for a technical consultant panel on the sample design of the National Electronic Injury Surveillance System (NEISS) in October 1974, and initiated activities of this panel in January 1974.

Special Functions

The panel, with various backgrounds (government, private industry, and academia), provides expert opinions and long-term experience in the field of sampling, as well as practical and theoretical knowledge of subject matter. The panel functions by providing expert opinions periodically on recommendations relating to the high reliability of information used to assist the Commission in making decisions.

The panel has met to review the current NEISS sample design and make recommendations for modifications, if needed. Interim recommendations have been discussed by BEP management with the panel for modifications to be considered for assurance of the integrity of the sample design of NEISS.

Reports and Recommendations

The panel will assist in preparation of a detailed paper to help evaluate the adequacy of the present sample design.

Commission Action

Not applicable pending receipt of report.

Established - When and Why

Described under section on "origin."

Frequency of Meetings

The panel has met in January, February and May 1975. It is expected that the panel will meet every other month until May 1976.

Staff Assistance

BEP support is limited to providing a place to meet and necessary transcription of interim recommendations made by the panel.

[The following was received in response to the Subcommittee Chairman's letter of Mar. 3, 1976:]

Answer.

The following updates the information provided in the June 25, 1975 questionnaire.

A. Product Safety Advisory Council

The Product Safety Advisory Council has met three times since June, 1975, and we anticipate that future meetings will be held quarterly. It has advised the Commission on the following specific matters:

o Development of a product identification regulation (in development)

o Policy on the application of section 6(b) of the CPSA in relation to the Freedom of Information Act (policy adopted)

o Procedural Policy for handling substantial product hazard matters (proposed and interim policy adopted)

o Exportation of products which present a substantial product hazard (policy under consideration)

B. Technical Advisory Committee on Poison Prevention Packaging

The Technical Advisory Committee on Poison Prevention Packaging has met twice since June, 1975; we anticipate that future meetings will be held every three months.

The committee advises the Commission on petitions for exemptions from the human prescription drug in oral dosage form regulation. Since June, 1975, the status of some of these petitions has changed, as follows:

	Drug	Petition No. (PP-)	Commission Action	Date
19.	Organidin	74-34	petition denied	2/5/76
21.	K-Lyte/Cl Powder	74-38	petition denied	8/29/75
27.	Bilopaque, Telepaque	74-44 74-45	petitions denied	9/11/75
30.	K-Lor	74-48	petition denied	8/29/75
32.	Vermox	75-2	petition denied, later reopened	6/2/75
33.	Achromycin, Decloy-mycin, et al.	75-4,5	petition granted	11/20/75
34.	Kay Ciel	75-11	petition denied	8/21/75
35.	Mandelamine	75-12	petition denied	3/17/76
36.	Signasul	75-13	petition withdrawn	10/31/75
37.	Nilstat	75-6	petition granted	11/30/75

C. National Advisory Committee for the Flammable Fabrics Act

This committee has met three times since June, 1975; future meetings will be held quarterly.

QUESTION #71 [June 25, 1975 Questionnaire]

How are the principal disciplines of government (engineering, law, public administration, accounting) represented among your senior staff skills? How are they represented on your professional staff as a whole? Give percentages for each major skill.

ANSWER

Defining senior staff as employees occupying GS-15 level and above positions excluding the four Commissioners and two Public Health Service Commissioned Officers, we have 96 senior staff members as indicated in the first column of the attached chart. The second column indicates total number of Commission employees distributed by discipline. The third shows percentage of total professional employees in each skill area, and the fourth column indicates percentage of senior staff in each skill area.

Major Skill Area	Senior Professional Staff	Total CPSC Professionals	Percent of Total Professional Employees	Percent of Senior Staff in Skill Area
General Administrative Management	*39	144	21.71	27.08
Economics	2	10	1.51	20
Personnel	1	11	1.66	9.09
Computer Science	1	23	3.47	4.34
Biological Science	2	9	1.36	22.22
Budget and Accounting	0	12	1.81	0
Medical Officer	2	2	.3	100
Health Sciences**	5	132	19.91	3.78
Veterinary Medical	0	1	.15	0
Engineering	10	55	8.29	18.18
Law	16	48	7.23	33.33
Information and Arts	1	25	3.77	4.0
General Business***	2	13	1.96	15.38
Physical Science	6	37	5.58	16.21
Library and Technical Information	1	16	2.41	6.25
Mathematics and Statistics	1	16	2.41	6.25
Operations Research	3	8	1.21	37.50
Education	4	8	1.21	50.0
Investigation	0	91	13.73	0
Supply Management	0	2	.3	0
TOTAL	96	603	100%	14.47%

*The general administrative management skill area includes employees in the following Civil Service Commission classification series: 301, 340, 341, 342, 343, 391, 160, 1654, 345, and 080.

**The Health Sciences skill area includes employees in the following series: 601, 685, and 696.

***The General Business skill area includes employees in the following series: 1101 and 1102.

QUESTION #73 [June 25, 1975 Questionnaire]

Identify the specific occasions in the last five fiscal years where any commissioner, or employee at the GS-15 grade equivalent, has appeared as an invited speaker, panel member, or guest before industry and professional organizations, before conventions, and before state and local regulatory bodies or meetings, to discuss Federal regulatory policies and practices. For each such appearance, show the following:

(a) Name of sponsoring organization and meeting's purpose.

(b) Location and date of session attended by Commission representative.

(c) Subject of Commission representative's presentation.

(d) Travel and subsistence costs of attendance.

(e) Costs borne by: (1) U.S. Government
(2) Sponsoring organization.
(3) Commission person.

(f) Speakers honorarium or fee:
(1) Nature: Cash
Other (Specify)
(2) Value

ANSWER

[The following charts were compiled from information submitted in response to the subcommittee's June 25, 1975, questionnaire and the subcommittee Chairman's letter of March 3, 1976:]

SUMMARY

ANALYSIS OF PURPOSE OF TRAVEL OF CONSUMER PRODUCT SAFETY COMMISSIONERS—GROUPS VISITED AND COST, MAY 1973 THROUGH DECEMBER 1975

	Total trips		Total cost	
	Number	Percent	Cost	Percent
Industry groups	48	34	$9,850.28	33
Professional groups	43	30	7,865.71	26
Consumer groups	8	6	1,213.04	4
Miscellaneous groups	12	9	2,030.70	7
Federal, State, and local government groups	10	7	2,285.97	8
Universities and schools	16	11	3,019.16	10
International organizations	2	1	2,861.23	9
Foreign government groups	1	1	748.50	2
Civic groups	2	1	215.71	1
Total	142		30,090.30	

SUMMARY

ANALYSIS OF PURPOSE OF TRAVEL OF CONSUMER PRODUCT SAFETY COMMISSIONERS—GROUPS VISITED AND COST, MAY 1973 THROUGH DECEMBER 1975

	Trips		Cost	
	Number	Percent	Cost	Percent
Chairman Simpson:				
Industry groups	16	50	$3,454.58	40
Professional groups	10	31	1,797.61	21
Consumer groups	1	3	216.30	3
International organizations	1	3	2,119.54	25
Federal, State, and local government groups	1	3	520.60	6
Universities and schools	3	9	430.27	5
Total	32		8,538.90	
Commissioner Franklin:				
Industry groups	8	25	2,215.22	26
Professional groups	4	13	1,008.84	12
Consumer groups	2	6	222.39	3
Miscellaneous groups	7	22	1,373.64	16
Federal, State, and local government groups	3	9	705.00	8
Universities and schools	5	16	1,144.59	14
International organization	1	3	741.69	9
Foreign government groups	1	3	748.50	9
Civic groups	1	3	215.71	3
Total	32		8,375.58	
Commissioner Newman:				
Industry groups	11	46	1,760.94	44
Professional groups	10	42	1,808.35	46
Federal, State, and local government groups	1	4	201.81	5
Universities and schools	2	8	205.91	5
Total	24		3,977.01	
Commissioner Kushner:				
Industry groups	6	26	1,146.46	29
Professional groups	12	52	2,282.33	58
Consumer groups	1	4	103.52	3
Miscellaneous groups	3	13	388.60	10
Civic groups	1	4	(1)	
Total	23		3,920.91	
Commissioner Pittle:				
Industry groups	7	23	1,273.08	24
Professional groups	7	23	968.58	18
Consumer groups	4	13	670.83	13
Federal, State, and local government groups	5	16	858.56	16
Universities and schools	6	19	1,238.39	24
Miscellaneous groups	2	6	268.46	5
Total	31		5,277.90	

[1] The cost of this trip was included in another trip.

Question 93 [June 25, 1975 Questionnaire].

Describe your Commission's relation with the Department of Justice on the litigation process. How are requests or recommendations to litigate initiated (from whom and to whom)? Is there a permanent liaison, communications or coordination process? Describe. Are your Commission's requests or recommendations usually followed. List all instances where such requests were not followed in the past five fiscal years. State reasons given. Does your Commission have an input in the preparation for trial or appeal of a matter? Describe the extent and manner of such input. Describe any instances in which your Commission has been deprived of an opportunity of making its views known to a court. Evaluate the quality of representation of your Commission by Department of Justice personnel with particular regard to the question of whether the expertise of the Commission has been adequately reflected in the presentation of specialized matters of particular Commission concern.

[The following was received in response to the Subcommittee's June 25, 1975 Questionnaire:]

Answer.

The Commission's relation with the Department of Justice on the litigation process is primarily carried out between the Commission's Office of the General Counsel, Division of Enforcement and the Consumer Affairs Section, Antitrust Division, Department of Justice. These two offices serve as the ongoing permanent liaison between the Department and the Commission.

Except where the Commission conducts its own litigation to fulfill its mission (see Question #91), the Consumer Affairs Section is responsible for coordinating with both the agency and a local U.S. Attorney in all enforcement cases brought on the agency's behalf. The Section also coordinates the defense of agency action against third party lawsuits, except in those types of lawsuits where another element of the Department has primary responsibility. (For example, Freedom of Information Act suits are handled by the General Litigation Section of the Civil Division.) When appeals are taken in Commission cases, the Appellate Section of the Antitrust Division coordinates such appeals, rather than the Consumer Affairs Section.

The litigation process encompasses three areas: (1) civil actions (seizures, injunctions, and civil penalty actions), (2) criminal prosecutions, and (3) defense of agency action against third party lawsuits.

For seizure actions, the Commission forwards a complaint for forfeiture to a local U.S. Attorney with a request that it be filed with the court as soon as possible. A copy of the complaint is sent by the Commission to the Consumer Affairs Section at the same time that the pleadings are mailed to a local U.S. Attorney. The seizure action is filed by a local U.S. Attorney without the prior concurrence of the Consumer Affairs Section, but the Section serves as "back-up" to the particular U.S. Attorney in the event the latter office has insufficient resources to handle the Commission's action.

After a seizure is filed, most coordination thereafter is between the local U.S. Attorney and the Commission's Office of the General Counsel, Enforcement Division. The latter office prepares consent decrees, orders for destruction, or other pleadings requested by the U.S. Attorney and forwards them to the U.S. Attorney for filing. Even for contested seizures, almost all coordination is between the U.S. Attorney's office and the Commission's attorneys, even though the Consumer Affairs Section is kept abreast of all developments in the case.

For criminal cases, the Commission's attorneys forward simultaneously to a local U.S. Attorney and the Consumer Affairs Section a complete recommendation package, containing the agency's entire inspection file which discloses the violations, and also containing a proposed criminal information which may include multiple counts.

Unlike seizure actions, for criminal prosecutions the local U.S. Attorney has been specifically precluded from making his/her prosecutorial decision and filing the case, until after he/she receives the prosecutorial recommendation of the Consumer Affairs Section.

Exhibit 93-1 (exhibit at end of answer to question) is a letter bearing date of January 10, 1974, which was sent from Assistant Attorney General Thomas E. Kauper to all local U.S. Attorneys, instructing them that final prosecutorial discretion in criminal cases should remain with the Attorney General. See discussion in response to Question 94 regarding duplication of effort and coordination, where Exhibit 93-1 is discussed further and note also the footnote in the answer to Question 94.

Whenever lawsuits are brought against the Commission, the Consumer Affairs Section coordinates the agency's defense with both the Commission's own attorneys and the local U.S. Attorney where the lawsuit is pending. See also answer to Question #94 regarding duplication and coordination in defense of third party lawsuits against the Commission.

As demonstrated by the statistical data set forth in Exhibit 93-2 (exhibit at end of answer to question), the Commission has not been successful in obtaining the concurrence of the Department of Justice in the majority of its recommendations for criminal prosecution. Out of a total of 29 criminal referrals, only 5 cases have been filed by U.S. Attorneys. This means that either the Department of Justice, the local U.S. Attorney, or both, have declined to prosecute or have taken no action whatsoever in approximately 83 percent of those cases referred by the Commission for criminal prosecution. Exhibit 93-3 contains letters received from

the Department of Justice (including local U.S. Attorneys) for those cases in which prosecution has been specifically declined.* These letters set forth the various reasons upon which the Department of Justice has relied for not adopting the Commission's recommendations.

As discussed above, initial pleadings in civil and criminal matters are prepared by the Commission and submitted to the Department of Justice as part of the enforcement recommendation. Occasionally, the Department finds it necessary to alter criminal pleadings to fit a traditional form acceptable to the attorney reviewing the case, without regard to whether the alterations alter or entirely delete the Commission's views. In some of these instances, pleadings have been altered to reduce the number of individuals charged or to exclude a parent corporation. Nevertheless, whatever alterations or adjustments the Department of Justice determines to be necessary, become final, and the Commission is thereafter precluded from further input at all stages of the criminal proceeding.

In civil matters, particularly those actions defended by the Commission, the Commission's attorneys generally prepare initial drafts of all pleadings and briefs. The Department of Justice attorneys thereafter edit, revise or accept the position of the Commission as they so determine. If Justice attorneys agree with a policy position of the Commission, the agency's draft submission may be accepted without much change. However, if the Department does not support the Commission's policy, then the Department of Justice can make the final decision as to what positions will ultimately be filed with the court in a given case.

Where a contested seizure develops after the U.S. Attorney has filed the seizure complaint, the Commission is permitted to prepare the initial response pleadings, whether briefs, motions, memoranda, answers, etc., which are submitted directly to the U.S. Attorney for final review and editing, where deemed appropriate. The Commission participates in the preparation for trial of a matter to the extent that the U.S. Attorney requests assistance. When government witnesses are needed to provide expert testimony and to establish a prima facie case, the Commission's attorneys participate in the process. Trial preparation and trial strategy decisions are jointly made by the Commission and the U.S. Attorney, although the U.S. Attorney conducts the trial with the assistance of the Commission attorneys as deemed necessary.

*The identity of the proposed defendants in Exhibits 93-3 have been deleted since the cases were never filed.

Having experienced only two instances in which the Commission has initiated appeal of a matter, there is little evidence available to measure the Commission's input during the drafting of appellate briefs, as compared to the level of input retained in the finished product as filed with the appellate courts involved.

The nature of the present system whereby Department of Justice personnel represent the Commission in court does indeed cause problems for the agency. While personnel in local U.S. Attorney's offices are generally efficient, the expertise of the Commission is not always adequately reflected, particularly in oral arguments and during the conduct of a trial.

Generally, most Assistant U.S. Attorneys or the Department of Justice attorneys who handle the Commission's cases are carrying heavy caseloads, in addition to the Commission's cases. Oftentimes, they have very little time to devote to obtaining a complete understanding of the Commission's case, or more particularly, of the in-depth aspects of the laws administered by the Commission. Particularly since the Consumer Product Safety Act is still relatively new, with only one court case having been decided thereunder (against an imminently hazardous trouble light), and also because four other laws were transferred to the Commission from other government entities, there are many complexities involved in the Commission's areas of jurisdiction, which can be difficult to absorb within a short time by someone unfamiliar with the matters. For this reason, attorneys employed by the Commission are relied upon by Assistant U.S. Attorneys when the latter are asked questions by the court during oral arguments. Similarly, during the conduct of an enforcement trial, Commission attorneys must oftentimes guide Assistant U.S. Attorneys when cross-examining witnesses and supply them with appropriate questions to ask the witnesses. Thus, without the benefit of detailed background knowledge of the Commission's work, Assistant U.S. Attorneys can lack the ability to "clinch" an argument or conduct appropriate cross-examination.

The quality of representation of the Commission by Department of Justice personnel can adversely affect the Commission in two additional aspects. First, Department attorneys may not view themselves as advocates to espouse the Commission's policy position but might view themselves as independent determiners of what the agency's position in court should be.

Secondly, the Department in certain respects has stock, "boilerplate" positions which are included in briefs filed on behalf of the agency. These positions are argued by Assistant U.S. Attorneys, without regard to their meaningful applicability to the instant case.

Thus, in summary, while individual attorneys within the Department or local U.S. Attorneys' offices are professionally dedicated

attorneys, they, too, appear helpless to deviate from established or set Department positions which require them to deal with the agency in predetermined ways. Commission attorneys are immersed daily in the laws subject to the Commission's jurisdiction. Such laws are oftentimes relatively foreign or unknown to most Assistant U.S. Attorneys. Since Commission attorneys must largely educate Department attorneys for any given case, the Commission believes needless duplication of effort would be avoided and the quality of its representation before the courts significantly improved if attorneys employed by the Commission were allowed to represent it in all cases. (See also answer to Question #94 regarding duplication and coordination of effort.)

[The Exhibits referred to are in the Subcommittee's files.]

[The following was received in response to the Subcommittee Chairman's letter of March 3, 1976:]

ANSWER

The response to question #93 remains the same with the exception that as of October 12, 1975, some portions of the litigation process which had been carried out by the Commission's Office of General Counsel were transferred to the Commission's Bureau of Compliance. These portions deal with some trial court actions such as criminal prosecutions, seizure actions, and some injunctive relief.

Question #94 [June 25, 1975 Questionnaire]

Estimate the costs, if any, of duplication of effort and the costs of coordination between your Commission and the Department of Justice in the litigation process.

[The following was received in response to the Subcommittee's June 25, 1975 Questionnaire:]

The only case involving significant time in which there has not been duplication of effort and coordination between the Commission and the Department of Justice was the action brought in the name of the Commission under Section 12 of the Consumer Product Safety Act against an imminently dangerous trouble light. This is true since Section 12(f) of the CPSA expressly provides that "the Commission may direct attorneys employed by it to appear and represent it." Thus, for an imminent hazard action, the prior concurrence of the Attorney General is not required before the Commission's own attorneys are authorized to represent the agency in court.

The Commission, as successor to the FTC for enforcement by Section 6(a) and (b) of the Flammable Fabrics Act, is authorized to institute actions for a temporary injunction or restraining order for alleged violations of the FFA, or to institute proceedings for the seizure and confiscation of products in violation of the FFA or a standard duly adopted or promulgated under the FFA. When such actions are brought by the Commission, there is no duplication of effort and all coordination with a local U. S. Attorney serves to conserve the time and resources of the agency. In such instances a local U. S. Attorney's office assists the Commission by physically filing its pleadings, thus eliminating the need for Commission attorneys to be present for filings and ststus calls in a case.

For seizures under the Poison Prevention Packaging Act and/or the Federal Hazardous Substances Act, which are forwarded directly to local U. S. Attorneys for filing (with informational copies to the Department in Washington), the local U. S. Attorneys assist the Commission by filing and handling such cases. Inasmuch as the vast majority of seizures are resolved either through consent decrees or orders for destruction, there is little occasion for duplication of effort and most coordination accrues to the benefit of the Commission.

The Commission's experience thus far with contested seizure actions has shown that the only extensive coordination results from coaching or preparing the Assistant U. S. Attorneys who would actually handle the case in court.

In the opinion of the Commission, the two areas in which there is needless duplication of effort and coordination involve criminal recommendations and suits against the agency.

By letter dated January 10, 1974 to all U. S. Attorneys (see Exhibit 93-1 at end of Question 93, letter to Mr. Wayman G. Sherrer),

(Question #94)

Assistant Attorney General Thomas E. Kauper stated that final prosecutorial discretion in criminal cases should remain with the Attorney General and that recommendations for criminal prosecution must be forwarded by the Commission to the Consumer Affairs Section of the Antitrust Division. Mr. Kauper further instructed all U. S. Attorneys that after review, the Consumer Affairs Section will forward the case and its recommendation for prosecution to the local U. S. Attorney for his prosecutorial decision.*/

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*/ In establishing the requirement that all CPSC criminal recommendations be reviewed initially by the Consumer Affairs Section and thereafter that the Section forward the case and the Section's recommendation to the local U. S. Attorney for his prosecutorial decision, Mr. Kauper placed a restriction upon the CPSC which is contrary to the manner in which FDA referrals are handled, and, indeed, is contrary to the U. S. Attorney's Manual (a 3-volume set of guidelines for U. S. Attorneys).

The Manual provides in pertinent part that

> "The Food and Drug Administration through the Assistant General Counsel... refers requests for legal action (criminal seizure, or injunction) directly to U. S. Attorneys.***
>
> "Upon receipt of a referral for prosecution or suit from the Assistant General Counsel, U. S. Attorneys should proceed as follows:
>
> "A. Criminal Cases -- As in all criminal cases the U. S. Attorneys are responsible for determining whether the matter warrants prosecution, and for selecting the proper defendants against whom to proceed. Naturally, consideration is given to the recommendations of the agency but the final responsibility is that of the U. S. Attorney. ***" U. S. Attorney's Manual, pp. 120-121 (Emphasis added in part.)

By virtue of Section 30(a) of the CPSA, all functions under the FHSA and PPPA were transferred to the Commission from the FDA. Hence, any instruction regarding the FDA in the U. S. Attorney's Manual should be equally applicable to the Commission.

(Question #94)

Under Mr. Kauper's restrictive arrangement, the degree of duplication of effort and coordination is considerable. Once a criminal case is forwarded simultaneously to the Department of Justice and to U. S. Attorney, Commission attorneys spend lengthy hours with both Assistant U. S. Attorneys and with attorneys from the Consumer Affairs Section. Under Mr. Kauper's arrangement, there have been instances where cases were unduly delayed, with the local U. S. Attorney indeed ready and willing to file the agency's case, but specifically precluded from doing so until such time as he/she was in receipt of the Consumer Affairs Section's recommendation.

In cases where the Commission is a defendant, as explained in the answer to Question 93, attorneys employed by the Commission prepare all initial drafts of briefs, and thereafter must "educate" attorneys from the Department of Justice as to the Commission's position.

During fiscal year 1975, no less than 28 cases were filed against the Commission or individual Commissioners, with an additional major challenge to the constitutionality of the CPSA having been filed in fiscal year 1974.

The amount of duplication of effort and coordination between Commission attorneys and Department of Justice attorneys, including personnel within local U. S. Attorneys' offices, is extensive in the cases where Commission actions must be defended against lawsuits by third parties.

From experience thus far in the Commission's existence, it can readily be estimated that the number of actions filed against the Commission will increase at a highly significant rate during fiscal year 1976 and beyond.

The Commission will promulgate consumer product safety standards and other regulations during FY 1976, with the inevitable court challenges to follow. More significantly, for petitions filed under Section 10 of the Consumer Product Safety Act after October 26, 1975 seeking to cause the agency to commence proceedings for the issuance, amendment or revocation of a consumer product safety rule, any petitioner may sue the Commission in a de novo trial, if at the end of 120 days the Commission either has denied the petition or otherwise failed to act. The Commission anticipates a tremendous increase in the number of lawsuits filed against it as a result of the petitioning process.

For example, to date approximately 50 petitions have been filed under the CPSA, with approximately 153 additional petitions having been filed under the FHSA, PPPA, or FFA. The Commission has granted

only 8 petitions filed under the CPSA and 20 petitions filed under the other acts.

While projections for fiscal year 1976 as to the number of enforcement actions and cases which will be filed against the Commission are difficult to make, the extrapolation of cost data concerning the duplication of effort and coordination between Commission attorneys and Department of Justice attorneys involves even more variables.

At the present time, a total of 5 attorneys and 2 secretaries are engaged full-time in the Commission's litigation workload. Their combined annual salaries are $151,185. In addition to the above personnel, other senior attorneys within the agency involve themselves in the agency's litigation on a less-than-full-time basis.

Thus, by using a round figure of $150,000 for full-time annual salaries and by adding an additional conservative sum of $75,000 to reflect a portion of the salaries of other persons involved in the agency's litigation on a less-than-full-time basis, an estimated total of $225,000 in salaries along is spent annually by the Commission on its litigation.

To the salary estimate of $225,000 should be added an overhead rate of at least 50 percent,*/ for a total of $337,500.

By using a best estimate that Commission attorneys and support personnel devote 60 percent of their time to matters involving duplication of effort and coordination with the Department of Justice, the Commission estimates that at least $202,500 is currently spent by the Commission in matters involving duplication and coordination of effort.

By further estimating that comparable sums would reflect the salaries and overhead expenses of Department of Justice personnel with whom Commission attorneys interface, a conservative best estimate of $405,000 is currently spent on duplication and coordination of effort.

As explained above, this sum can reasonably be expected to increase substantially as the agency is involved in more litigation, thus requiring the services of additional attorneys and support personnel.

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*/ Some agencies charge considerably more than 50% as an overhead factor. For example, the Maritime Administration of the Department of Commerce adds an overhead rate of 94.3% (in addition to fringe benefits) for the salary cost of the services of its administrative law judge when on loan to other agencies of the government.

[The following was received in response to the Subcommittee Chairman's letter of Mar. 3, 1976:]

ANSWER

The response to question #94 remains the same, with the exception that the statistical data is updated for FY 76 as follows:

To date in fiscal year 1976, a total of 7 cases have been filed against the Commission or individual Commissioners. In addition, a total of 20 cases filed against the Commission in prior fiscal years are still pending.

Similarly, a total of 28 petitions have been filed with the Commission in FY 76. The Commission also has pending a total of 40 petitions from prior fiscal years.

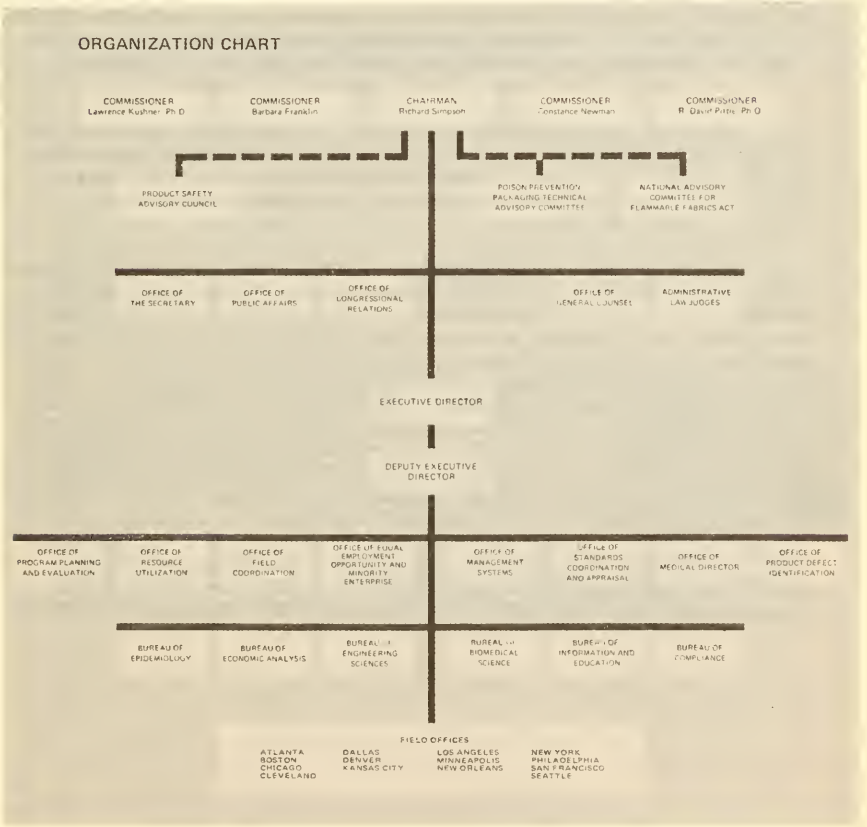
Of particular significance are petitions filed under the CPSA after October 26, 1975, since the petitioner may sue the Commission in a de novo trial if at the end of 120 days the Commission either has denied the petition or otherwise failed to act. A total of 6 petitions have been filed under the CPSA since October 26, 1975.

Mr. MAGUIRE. The committee is adjourned.
[Whereupon, at 4:50 p.m., the subcommittee adjourned.]

APPENDIXES

APPENDIX A

Organization Chart of CPSC and Description of Functions of Bureau and Offices



Subject: ORGANIZATION OF THE CONSUMER PRODUCT SAFETY COMMISSION

1. FUNCTIONS.

a. OFFICE OF THE SECRETARY. The Office of the Secretary plans, schedules, records, and follows through on meetings of the Commission and is responsible for the management of advisory councils and committees and administers Commission policies under the Freedom of Information Act. It maintains the docket of Commission actions, publishes the Public Calendar, controls correspondence for the signature of the Commissioners, and issues Commission decisions, rules, standards, reports, and other official documents, and maintains the Commission Seal.

b. OFFICE OF PUBLIC AFFAIRS. The Office of Public Affairs is the principal contact point with the information media. It prepares and releases statements, speeches, press releases, and other materials concerning the policies and activities of the Commission. It provides editorial review and comment for nonroutine releases including films, slides, videotape and audio as required and provides coordinating policy on the release of information to the information media from the Offices and Bureaus (excluding Freedom of Information materials) within CPSC.

c. OFFICE OF CONGRESSIONAL RELATIONS. The Office of Congressional Relations is the principal contact point with the committees and members of the Congress. It performs liaison duties for the Commission and provides information and assistance to the Congress on matters of Commission policy and programs.

d. OFFICE OF THE GENERAL COUNSEL. The Office of the General Counsel provides advice and counsel to the Commissioners and the organizational components of the Commission on matters of law arising under the Consumer Product Safety Act, related statutes, and administrative operations of the Commission. The Office prepares the Commission legislative program and comments on relevant legislative proposals originating elsewhere. Other than enforcement litigation, which is the primary responsibility of the Bureau of Compliance, the Office conducts or supervises the conduct of litigation to which the Commission is a party, according to arrangements with the Attorney General. It provides final legal review of product safety standards, rules, bans, or regulations; and legal review of certain procurement, personnel, and administrative actions.

e. OFFICE OF ADMINISTRATIVE LAW JUDGES. The Office of Administrative Law Judges performs such duties in connection with matters of adjudication as prescribed by the Commission and required by statute.

f. OFFICE OF THE EXECUTIVE DIRECTOR. Under the direction of the Chairman and in accordance with Commission policy, the Office of the Executive Director is responsible for the oversight of Commission operations and the allocation and utilization of Commission resources. It exercises supervision over Commission Offices, Bureaus, and Field activities.

g. OFFICE OF PROGRAM PLANNING AND EVALUATION. The Office of Program Planning and Evaluation is responsible for the development of the Commission's goals and objectives, program and resource plans, budget function and analysis of program accomplishment. It prepares the Commission's long-range and annual program plan and budget in consultation with other Offices and Bureaus. It develops and uses analytical methods, standards, and techniques for the measurement of program results. The Office conducts studies of program accomplishment and recommends such changes as may be required to increase the effectiveness of the Commission's programs and activities. It is responsible for preparation of the annual report to the Congress in accordance with the Consumer Product Safety Act (PL 92-573, Section 27 (j)).

h. OFFICE OF RESOURCE UTILIZATION. The Office provides advice and assistance to the Offices and Bureaus of the Commission on financial matters, develops accounting policies and financial systems, and conducts or supervises the conduct of the fiscal operations of the Commission. It develops the personnel policies of the Commission and conducts personnel operations. It develops contract and grant policies and regulations, obligates and administers Commission contracts and grants, and provides administrative services to the Commission. It administers the Commission Directives System and property management, security, and transportation services.

i. OFFICE OF FIELD COORDINATION. The Office of Field Coordination is the central point for coordination and assistance on field activities of the Commission. The Office works closely with the other Offices and Bureaus and the Field Offices to assure effective Headquarters-Field relationships, proper allocation of resources to support CPSC priorities in the field, effective performance of field tasks, and representation of Field views in policy development. It coordinates and reviews field directives, and prepares field program documents. It provides policy on direct contact procedures between Headquarters and Field offices. The Office is responsible for liaison with State, local and other Federal agencies on product safety programs in the field.

j. OFFICE OF PRODUCT DEFECT IDENTIFICATION. The Office of Product Defect Identification supports the Commission's mandate to protect the public from injury and further exposure to substantial product hazards stemming from consumer products generally but not always, in the hands of consumers. It actively identifies as well as encourages manufacturers, retailers and distributors to identify and report specific products which because of a pattern of defect could create a substantial hazard. It is responsible for management of product defect notifications required under Section 15 of the CPSA and for continual analysis of historic patterns of product defect.

k. OFFICE OF EQUAL EMPLOYMENT OPPORTUNITY AND MINORITY ENTERPRISE. The Office provides advice to the Chairman and Executive Director on matters relating to Equal Employment Opportunity. The Office is responsible for the development and maintenance of the Commission's overall Equal Employment Opportunity Program both internal and external. It provides policies, procedures, guidelines and direction to assure equal opportunity in employment for all qualified persons. The Office develops, implements, and oversees regulations and procedures for assurance of nondiscrimination in Federally assisted programs and contracts in accordance with Title VI of the Civil Rights Act of 1964 and Executive Order 11246. It develops and maintains a program to ensure equal opportunity in the award of Commission contracts and grants.

l. OFFICE OF STANDARDS COORDINATION AND APPRAISAL. The Office is responsible for coordinating the development of standards and rules for all consumer products for which safety standards or labeling requirements are indicated. The Office recommends whether a standard is to be developed by the Commission or by an offeror. It compiles the legal, technological, economic and social impact of proposed standards primarily coordinating the input of other Bureaus, Offices, agencies and organizations. It establishes the governing policies for and encourages the development of standards by other agencies, organizations and offerors and participates in the development of international product safety standards. The Office exercises quality control review on proposed and final standards, including final format. It coordinates or calls industry-CPSC meetings during standards development or potential standards development phases and establishes criteria for and determines the adequacy of standards development offerors.

m. OFFICE OF THE MEDICAL DIRECTOR. The Office provides the other Offices and Bureaus of the Commission with medical review knowledge and services. It assists the Bureau of Engineering Sciences and Bureau of Biomedical Sciences in establishing medically-sound findings and human factors considerations in support of product safety standards. It is responsible for liaison with the medical profession.

n. OFFICE OF MANAGEMENT SYSTEMS. The Office of Management Systems has the primary responsibility for the design, implementation and maintenance of all automated systems in the Commission. It is responsible for providing centralized Automatic Data Processing systems support services as required.

o. BUREAU OF EPIDEMIOLOGY. The Bureau collects data on consumer product-related hazards and potential hazards; determines the frequency, severity, and distribution of the various types of injuries and investigates their causes; assesses the effects of product safety standards and programs on consumer injuries; participates in determining priorities in establishing standards or taking other measures to reduce or prevent accidents; and conducts studies and research in the fields of consumer product-related injuries. The Bureau maintains an injury data clearinghouse and manages the National Electronic Injury Surveillance System (NEISS).

p. BUREAU OF ECONOMIC ANALYSIS. The Bureau provides advisory services on economic affairs. It studies the costs, benefits, environmental impact, and economic effects of CPSC programs and standards. The Bureau acquires, compiles, and maintains product economic data to be available for further CPSC analysis for priorities, standards, or potential standards. It plans and carries out economic surveys. It conducts economic analyses relative to costs of injury, preventable injury costs, and economic and environmental evaluation of the final impact of Product Safety Standards.

q. BUREAU OF ENGINEERING SCIENCES. The Bureau of Engineering Sciences develops and evaluates performance criteria, design specifications, and quality control standards for consumer products. It designs, conducts, monitors, and evaluates product safety tests and test methods. The Bureau participates in the development of product safety standards and provides advice on proposed standards. It performs or monitors research in the engineering sciences, and provides technical liaison with the National Bureau of Standards and other organizations concerned with the engineering science aspects of public health. It exercises technical supervision over Commission engineering laboratories and testing facilities.

r. BUREAU OF BIOMEDICAL SCIENCE. The Bureau is responsible for programs which reduce the hazards of human injury from chemical consumer products. It designs, conducts, evaluates and monitors toxicological and chemical tests to identify the potential for acute or chronic hazards. It participates in the development of standards, rules and regulations. The Bureau reviews and evaluates scientific, technical and medical reports, studies, and data concerned with chemical hazards, and provides biomedical support for the promulgation and enforcement of labeling, banning, and packaging standards. The Bureau provides a technical liaison with the Department of Health, Education and Welfare and other organizations concerned with chemical and biological aspects of Public Health. It exercises technical supervision over Commission chemical and biological laboratories and testing facilities.

s. BUREAU OF INFORMATION AND EDUCATION. The Bureau provides information to consumers, manufacturers, and the public generally on matters concerning consumer product safety. It creates and produces routine educational materials, conducts educational campaigns for the reduction of consumer injuries and elimination of hazards, publishes studies and reports, develops technical training programs, provides training and technical assistance and assists other Bureaus and Offices of the Commission in disseminating product safety information. It seeks broad input from the public generally on matters concerning consumer product safety.

t. BUREAU OF COMPLIANCE. The Bureau is responsible for assuring that the production, importation, and marketing of consumer products comply with product safety standards and Commission rules, regulations, and decisions. It participates in the development of rules and programs for the enforcement of Commission decisions and provides case guidance. It conducts or supervises the conduct of inspection, enforcement, surveillance, monitoring and other compliance activities. Compliance litigation relative to complaints, injunctions and condemnation proceedings, is conducted in coordination with the Office of the General Counsel.

u. FIELD OFFICES. Field Offices are responsible for carrying out investigational, compliance and community services activities within their areas. They support and maintain liaison with CPSC Headquarter's units, other Field Offices and appropriate Federal, State and local government offices. They assure and encourage compliance with the laws and regulations enforced by the Commission. Selected Field Offices possess laboratory capabilities. The Field Office locations and areas covered are as follows:

Field Office Location	Areas Covered
Atlanta, Georgia	Georgia, Kentucky, Tennessee, North Carolina, South Carolina, Mississippi, Alabama, Florida
Boston, Massachusetts	Maine, Vermont, New Hampshire, Massachusetts, Rhode Island, Connecticut
Chicago, Illinois	Illinois, Indiana
Cleveland, Ohio	Ohio, Michigan
Dallas, Texas	Texas, New Mexico, Oklahoma, Louisiana, Arkansas

Field Office Location	Areas Covered
Denver, Colorado	Colorado, Utah, Wyoming, Montana, North Dakota, South Dakota
Kansas City, Missouri	Kansas, Iowa, Missouri, Nebraska
Los Angeles, California	Imperial County, Los Angeles County, Orange County, Riverside County, San Bernardino County, San Diego County, San Luis Obispo County, Santa Barbara County and Ventura County; Arizona
Minneapolis, Minnesota	Minnesota, Wisconsin
New York, New York	New York, New Jersey, Puerto Rico, Virgin Islands
Philadelphia, Pennsylvania	Pennsylvania, Maryland, Delaware, Virginia, West Virginia
San Francisco, California	All other counties not covered by Los Angeles Area Office; Nevada, Hawaii
Seattle, Washington	Washington, Oregon, Idaho, Alaska

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APPENDIX B

Commission's Description of the Industry It Regulates

(Source: Response to subcommittee questionnaire of June 1975)

QUESTION #3. Describe the regulated industry(ies) as of December 31, 1960; December 31, 1965; December 31, 1970; and December 31, 1974, in terms of --

(a) number of companies;

(b) volume of business in terms of goods or services produced;

(c) number of industry employees;

(d) value of plant facilities, or firms;

(e) profit levels: industry average and 10 largest individual companies; and

(f) concentration levels: largest four and largest eight firms.

The CPSC has authority to regulate and set uniform safety standards for certain consumer products and their components. Regulation of industries, companies, and firms is, therefore, only an indirect result of consumer product safety regulation. Moreover, Commission jurisdiction extends to only those activities and parts of an industry, company, or firm related to consumer product importation, production, distribution, or sale. CPSC regulation does not extend to rate regulation. The industries and the exact number of companies and establishments subject, indirectly, to Commission regulation are impossible to determine accurately. We have, however, estimated data for the companies and establishments judged likely to make or sell consumer products.

(a) Number of Companies

For each class within the major industry groups identified by the Department of Commerce in its most recent Enterprise Statistics (1967), the Bureau of Economic Analysis of CPSC made a judgment on whether the class included companies and establishments which might manufacture or sell consumer products. If it were determined that members of the class did so, data for the entire class were included in estimated totals of companies and establishments possibly regulated. Table 1 shows that over 2 million companies, or about 2.5 million establishments may be subject to Commission regulation of the consumer products they make or sell.

(b) Volume of Business in Terms of Goods or Services Produced

For each of the classes determined by the method described in (a), 1967 sales and receipts were totaled to arrive at an estimate of the sales and receipts of firms possibly within Commission jurisdiction. Companies in this category account for $752 billion in sales and receipts. The corresponding amount for establishments

is $759 billion. (Dollar values for establishments exceed company totals for most classes because company data exclude the values of intra-company transfers among its own establishments.) These data are presented in Table 2. [Note: These data do not represent the final value of goods and services possibly subject to CPSC jurisdiction because transfers of intermediate and final goods and services between and among firms and industries are not eliminated.]

(c) Number of Industry Employees

By the same method described in (a), employment data for classes judged as including companies and establishments possibly regulated were totaled. Table 3 shows that companies possibly regulated employed about 24 million people in 1967 and establishments possibly regulated employed about 22 million.

(d) Value of Plant Facilities, or Firms

Value of plant facilities, or firms is not available in a meaningful form. The scope of CPSC jurisdiction is so broad -- possibly covering 50% of all companies in the U.S. -- that it is not feasible to analyze all companies to the extent necessary to gather accurate information. Published data include value of plant information for companies regardless of the products, many of which may not be consumer products, manufactured in the plant. Therefore, the value of plants actually producing products within Commission jurisdiction would be grossly overstated by these published data. Also, value of plant facilities are not routinely estimated since CPSC does not regulate rates and is, thus, not routinely concerned with returns to capital.

(e) Profit Levels: Industry Average and 10 Largest Individual Companies

While the profit levels of companies are studied during an economic impact analysis of a specific proposed Commission action, this information is not collected, nor is it meaningful to collect it, for all the industries and companies within possible CPSC jurisdiction. In addition, since many companies manufacture or sell more than one product, and products which are not consumer products, it is not always possible to determine the contribution to profits from specific consumer products subject to CPSC regulation.

(f) Concentration Levels: Largest Four and Largest Eight Firms

Concentration levels for a group of firms producing consumer products cannot be readily determined since the same consumer product may be produced by firms classified in a number of different industries. Also, CPSC jurisdiction extends to imported as well as domestically produced products and to distribution and sales as

well as to production. Information concerning concentration ratios published by the U.S. Department of Commerce reflects only domestic production and is on an industry basis, not by product classification.

In preparing economic impact analyses of proposed Commission actions, information is developed to determine production of the products affected by the action, companies producing or distributing these products, and the contribution each company makes to total product production or distribution.

TABLE 1. COMPANIES AND ESTABLISHMENTS*

INDUSTRY	COMPANIES			ESTABLISHMENTS		
	Total	Possible Numbers Regulated	Percent Possibly Regulated	Total	Possible Numbers Regulated	Percent Possibly Regulated
All Industries	4,410,000	2,191,000	50%	4,840,000	2,433,000	50%
Mineral	20,000	---	--	28,000	---	--
Construction	796,000	753,000	95%	799,000	756,000	95%
Manufacturing	267,000	166,000	62	306,000	191,000	62
Wholesale Trade	233,000	151,000	65	291,000	194,000	67
Retail Trade	1,683,000	1,121,000	67	1,898,000	1,292,000	68
Service	1,397,000	---	--	1,449,000	---	--
Misc. Transportation	15,000	---	--	16,000	---	--
Other	---	---	--	53,000	---	--

*Estimates based on 1967 Enterprise Statistics. All numbers are rounded.

TABLE 2. SALES AND RECEIPTS*

INDUSTRY	COMPANIES			ESTABLISHMENTS		
	Total ($millions)	Possible Value Regulated ($millions)	Percent Possibly Regulated	Total ($millions)	Possible Value Regulated ($millions)	Percent Possibly Regulated
All Industries	$1,323,000	$752,000	57%	$1,563,000	$759,000	49%
Mineral	11,000	---	--	26,000	---	--
Construction	100,000	76,000	76%	102,000	77,000	75%
Manufacturing	577,000	321,000	56	558,000	303,000	54
Wholesale Trade	258,000	131,000	51	304,000	164,000	54
Retail Trade	305,000	223,000	73	314,000	215,000	69
Service	69,000	---	--	73,000	---	--
Misc. Transportation	2,000	---	--	2,000	---	--
Other	---	---	--	184,000	---	--

*Estimates based on 1967 Enterprise Statistics. All numbers are rounded.

TABLE 3. EMPLOYMENT*

INDUSTRIES	COMPANIES EMPLOYMENT			ESTABLISHMENTS EMPLOYMENT		
	Total	Employment Possibly Regulated	Percent Possibly Regulated	Total	Employment Possibly Regulated	Percent Possibly Regulated
All Industries	41,921,000	23,951,000	57%	41,921,000	22,287,000	53%
Mineral	380,000	---	--	520,000	---	--
Construction	3,423,000	2,545,000	74%	3,441,000	2,556,000	74%
Manufacturing	21,377,000	13,264,000	62	18,499,000	11,609,000	63
Wholesale Trade	2,644,000	1,663,000	63	2,809,000	1,799,000	64
Retail Trade	9,710,000	6,479,000	67	9,589,000	6,323,000	66
Service	4,243,000	---	--	4,366,000	---	--
Misc. Transportation	144,000	---	--	147,000	---	--
Other	---	---	--	2,550,000	---	--

*Estimates based on 1967 Enterprise Statistics. All numbers are rounded.

Definitions and Descriptions of Terms

Company

For purposes of the Enterprise Statistics a company consists of all domestic establishments specified by the reporting firm to be under its ownership or control as of the end of 1967. If a company owned or controlled other companies, all establishments of its subsidiaries were also included as part of the owning or controlling company.

Establishment

An establishment is defined in the economic census as a business or industrial unit at a single physical location which produces or distributes goods, or performs services.

Employment

Employment data represent full-time and part-time employees reported on establishment payrolls during certain specific pay periods in 1967.

Sales and Receipts

Sales and receipt figures collected in the 1967 economic census were of two types. The first represents gross sales and receipts reported by establishments, including the estimated values assigned to intra-company transfers of goods and services among establishments within the same firm. Because of the duplication inherent in such establishment reporting, however, company aggregates of these establishment sales and receipts ordinarily exceed the firm's net sales and receipts which reflect commercial transactions with outside customers only.

The second context represents net sales and receipts reported by companies, excluding the value of intra-company transfers among their own establishments.

Mineral/Mining

Mining is used in the broad sense to include the extraction of minerals occurring naturally; quarrying; well operation; milling; and other preparation customarily done at the mine site, or as a part of mining activity.

Construction

The term construction includes new work, additions, alterations, and repairs. Some examples of the type of work in this division are constructions of dwellings and buildings; painting; plumbing; electrical work; carpentry; and the erection of elevators, sprinklers systems, central air conditioning equipment, and swimming pools.

Manufacturing

This division includes establishments engaged in the mechanical or chemical transformation of materials or substances into new products.

Wholesale Trade

This division includes establishments or places of business primarily engaged in selling merchandise to retailers; to industrial, commercial, institutional, farm, or professional business users; to other wholesalers; or acting as agents or brokers in buying merchandise for or selling merchandise to such persons or companies.

Retail Trade

This division includes establishments engaged in selling merchandise for personal or household consumption, and rendering services incidental to the sale of the goods. In general, retail establishments are classified by kind of business according to the principal lines of commodities sold (groceries, hardware, etc.), or the usual trade designation (drug store, cigar store, etc.)

Services

This division includes establishments primarily engaged in providing a wide variety of services for individuals, business and government establishments, and other organizations.

APPENDIX C

BUDGET REQUESTS OF PRESIDENT AND COMMISSION FOR FISCAL YEARS 1975–77

CPSC'S BUDGET REQUEST—FISCAL YEARS 1975–77

[In thousands of dollars]

Budget category	1975	1976	1977
Hazard identification	5,923	5,703	6,262
Hazard analysis and remedy	11,488	13,931	1,864
Regulatory development			6,831
Policy development and support	1,974	2,384	
Information and education	5,054	5,922	3,900
Compliance and enforcement	14,944	14,727	12,083
Administration	3,162	7,624	10,172
Administrative law judge	274	95	
Total	42,819	50,386	41,112
Total personnel positions	(989)	(1,060)	(890)

PRESIDENT'S RECOMMENDED BUDGET FOR CPSC—FISCAL YEARS 1975–77

[In thousands of dollars]

Budget category	1975	1976	1977
Hazard identification	5,923	4,935	5,714
Hazard analysis and remedy	11,488	7,212	1,288
Policy development and support	1,974	2,336	5,726
Information and education	5,054	4,736	3,332
Compliance and enforcement	14,944	12,077	
Administration	3,162	5,246	11,565
Administrative law judge	274	53	9,387
Total	42,819	36,595	37,012
Total personnel positions	(989)	(890)	(890)

APPENDIX D

ENCLOSURE TO COMMISSIONER NEWMAN'S STATEMENT

The Consumer Product Safety Commission: Does It Can the Ash Report?

CONSTANCE B. NEWMAN*
JUDITH A. HERMANSON**
JAMES A. BRODSKY***

The President's Advisory Council on Executive Organization, after examining the structure and functioning of independent

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* Commissioner and Vice Chairman, U.S. Consumer Product Safety Commission. A.B., Bates Coll., 1956; B.S.L., Univ. of Minn. Law School, 1959. Commissioner Newman is the author of the "Policy Formulation" section.

** Special Assistant to Commissioner Newman, U.S. Consumer Product Safety Commission. A.B., Smith Coll., 1967; M.A., The George Washington Univ., 1968. Ms. Hermanson is the author of the "Accountability" section.

*** Special Assistant to Commissioner Newman, U.S. Consumer Product Safety Commission. B.S., Cornell Univ., 1967; M.S.E.E., Columbia Univ., 1968; J.D., Georgetown Univ., 1972. Mr. Brodsky is the author of the "Management Effectiveness and Quality" section.

THE FOLLOWING AUTHORITIES ARE CITED AS INDICATED BELOW:

PRESIDENT'S ADVISORY COUNCIL ON EXECUTIVE ORGANIZATION, A NEW REGULATORY FRAMEWORK: REPORT ON SELECTED INDEPENDENT REGULATORY AGENCIES (1971) [hereinafter cited as ASH REPORT].

J. LANDIS, REPORT ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT (1960), *issued as* SUBCOMM. ON AD. PRACTICE & PROCEDURE, SENATE COMM. ON THE JUDICIARY, 86TH CONG., 2D SESS. (Comm. Print 1960), *reprinted in* SUBCOMM. ON SEPARATION OF POWERS, SENATE COMM. ON THE JUDICIARY, SEPARATION OF POWERS AND THE INDEPENDENT AGENCIES: CASES AND SELECTED READINGS, S. DOC. NO. 49, 91st Cong., 1st Sess. 1301 (1969) [hereinafter cited as LANDIS REPORT].

COMM'N ON ORGANIZATION OF THE EXECUTIVE BRANCH OF GOV'T, THE INDEPENDENT REGULATORY COMMISSIONS (1949), *also issued as* H.R. DOC. NO. 116, 81st Cong., 1st Sess. (1949), *reprinted in* SUBCOMM. ON SEPARATION OF POWERS, SENATE COMM. ON THE JUDICIARY, SEPARATION OF POWERS AND THE INDEPENDENT AGENCIES: CASES AND SELECTED READINGS, S. DOC. NO. 49, 91st Cong., 1st Sess. 882 (1969) [hereinafter cited as HOOVER REPORT].

COMM'N ON ORGANIZATION OF THE EXECUTIVE BRANCH OF GOV'T, TASK FORCE

regulatory agencies, made several findings and recommendations concerning agency reorganization. Commissioner Newman, Ms. Hermanson, and Mr. Brodsky examine the applicability of these findings, which deal with policy formulation, accountability, and quality and effectiveness of management, in view of the experiences and policies of the Consumer Product Safety Commission. They argue that the CPSC's experiences have not supported the conclusion that collegial bodies, as opposed to single administrators, are less efficient mechanisms for implementing policy. According to the authors, the Council's criticism that collegial bodies are not sufficiently accountable to the President or Congress is inapplicable to the CPSC because of the Commission's conscious effort not to insulate itself, and because of its statutory mandate of accountability. Finally, the authors cite several examples of the Commission's accomplishments to demonstrate, contrary to the Council's findings, that a collegial body can effectively manage an agency.

In 1971, the President's Advisory Council on Executive Organization studied independent regulatory agencies and in its report, the *Ash Report*, recommended fundamental changes in their structures.[1] Its central finding was that the present regulatory structures were inappropriate because they limited the agencies' effectiveness to respond, as required by their mandates, to economic, technological, and social changes. The specific findings of the *Ash Report* were that inherent difficulties in the collegial form of organization prevent the agencies from being effective in both policy formulation and management; regulatory agencies are not sufficiently accountable for their actions to either Congress or the President; deficiencies in the performance of regulatory agencies are a result, in part, of the difficulty of attracting highly qualified Commissioners; certain judicial activities of the agencies conflict with their policy-making responsibilities; and certain functional responsibilities are inappropriately distributed among the various agencies.

The *Ash Report* recommended that most regulatory agencies be administered by single administrators, appointed by the President with the advice and consent of the Senate, and serving at the pleasure of the President. Internal agency review of proceedings should be limited in time and focused primarily upon the consistency of the decisions with agency policy. Further, appeals from final agency decisions should be heard by an Administrative Court of the United States.

In reviewing the regulatory agencies, the *Ash Report* examined three basic aspects of regulatory administration: The effectiveness of policy formulation, the extent to which agencies are accountable to Congress and the President, and the effectiveness of management and

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Report on Regulatory Commissions (1949), *reprinted in* Subcomm. on Separation of Powers, Senate Comm. on the Judiciary, Separation of Powers and the Independent Agencies: Cases and Selected Readings, S. Doc. No. 49, 91st Cong., 1st Sess. 812 (1969) [hereinafter cited as Hoover Task Force Report].

1. Ash Report.

the ability to attract and retain able personnel. Dealing with each of these aspects separately, this article seeks to analyze the relationship between the *Ash Report's* findings[2] and the Consumer Product Safety Commission's (CPSC)[3] experience by considering how the *Ash Report*'s concerns are being met by the structure of the new independent agency and by determining the experience of the CPSC. These considerations will then be used as a basis for judging the findings and recommendations of the *Ash Report.*

Policy Formulation

In analyzing regulatory agencies, the *Ash Report* considers, among other factors, the agencies' effectiveness in policy formulation. Given the increasing number of complex issues, the *Ash Report* contended that if agencies are to carry out their mandates they must devote added attention to formulating "anticipatory policies of wider applicability" through efficient informal procedures and the issuance of rules and regulations.[4] More specifically, the *Ash Report* developed the thesis that collegial bodies are inefficient mechanisms for the timely formulation of policy through rulemaking and informal procedures. The report concludes:

> Coequal commissioners too often have difficulty agreeing on major policy statements or rules. They tend to avoid the difficulty, preferring to wait for a suitable case to come along which will force the issue, though often in a narrow fact situation. Thus, to a large extent, Commission policy must be discerned from an analysis of *ad hoc* case determinations which frequently

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2. Like the similar efforts of its predecessor study commissions, *see, e.g.*, McFarland, *Landis' Report: The Voice of One Crying in the Wilderness*, 47 VA. L. REV. 373 (1961), the *Ash Report* has provoked a critical response in the literature. In Lazarus & Onek, *The Regulators and the People*, 57 VA. L. REV. 1069 (1971), for example, an analysis of the *Report* concluded:

> The operation of the regulatory system today presents a crisis for democracy, as well as an impediment to the managerial aims of the President. *It is a crisis which cannot be solved merely by shuffling boxes on an organization chart as if they were divisions of a great corporation.* We must develop reforms that will banish from Washington the disgraceful spectacle of the "captive" regulatory agency, open the closed files of bureacracy to public inquiry, and assure meaningful and vigorous public participation in agency procedures and decisions.

Id. at 1096 (emphasis added). *See also* R. NOLL, REFORMING REGULATION (1971). Literary responses aside, however, the *Ash Report* has apparently generated little other reaction. Neither the President for whom it was prepared nor his successor has managed to translate its major recommendations into legislation, and the Congress, subsequent to the release of the *Ash Report*, has created a new independent agency whose structure is the antithesis of the *Ash Report's* proposals.

3. The CPSC was established as an independent regulatory agency in 1972. *See* 15 U.S.C. § 2053 (Supp. III, 1973).

4. ASH REPORT 34.

> do not give sufficient guidance with respect to similar but distinguishable situations.[5]

It is clear that policy formulation within regulatory agencies is crucial to ensuring that agencies perform their fundamental responsibility of giving meaning to the broadly stated objectives set out by Congress.[6] What is to be examined in light of the CPSC's experience is the *Ash Report's* conclusion that collegial bodies are inefficient mechanisms for formulating and implementing specific policy.[7]

The Environment for Policy Formulation

The CPSA has four basic purposes: To protect the public against unreasonable risks of injury associated with consumer products; to assist consumers in evaluating the comparative safety of consumer products; to develop uniform safety standards for consumer products and to minimize conflicting state and local regulations; and to promote research and investigation into the causes and prevention of product-related deaths, illnesses, and injuries.[8] To accomplish the goals of the Act, the Commission,[9] by a majority vote, has the authority to develop general policies and to issue regulatory decisions, findings, and determinations as specified in the Consumer Product Safety Act. The other participants in Commission policy formulation are the staff and the public; their roles vary according to the manner in which the policy issue is raised.

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5. *Id.*

6. Numerous reasons have been advanced for the necessity for policy formulation within regulatory agencies. Hector advanced the view that although the failure to make policy is unfair to individual litigants, far more pernicious is the immunity from public, congressional, and executive criticism and control which this failure entails. He contended also that it is almost impossible to examine an agency's policies because it is almost impossible to determine what those policies are; one generally must be able to deduce them from a string of disconnected decisions that are often conflicting and seldom articulate. Hector, *Problems of the CAB and the Independent Regulatory Commissions*, 69 YALE L.J. 932, 943 (1960). A second reason advanced for the necessity of policy formulation is that policies provide warnings to the public and aid enforcement. McFarland, *supra* note 2, at 436. Additionally, McFarland suggested that a system of policy formulation would serve to guide, sharpen, and expedite the administrative process, inform interested private parties, and serve as the basis for simplifying procedures in contested cases. *Id.* at 437.

7. Regulatory agencies have used various methods of policy formulation. The one method most often used and most frequently criticized is the case-by-case method (i.e., the articulation of principles in the course of time by lining up precedents). McFarland, *supra* note 2 at 433. Those who criticize the case-by-case approach cite its inadequacy in that the common law tradition is not compatible with speed, specialization, or rapidly changing areas of operation. The argument proceeds as follows:

> Those who face administrative regulation cannot and should not be required to await the centuries when administrative precedents will have become the new equity. More importantly, for present purposes, administrators bemused with the notion of precedent as a way of policy-making do the regulatory system its greatest disservice. They not only put off the formulation of rational policy expositions for themselves and others until another day but they also leave it subject to the exigencies of time and circumstances.

Id.

8. 15 U.S.C. § 2051(b) (Supp. III, 1973).

9. The present Commission is composed of: Richard O. Simpson, Chairman; Constance B. Newman, Vice Chairman; Barbara H. Franklin, Lawrence M. Kushner, and R. David Pittle, Commissioners.

There are four basic systems for policy formulation. General policy guidelines can be initiated by the Commissioners and reviewed by the staff and the public before being promulgated. General policy guidelines can be initiated by the staff and reviewed and either altered, adopted, or rejected by the Commission. Policy guidelines can also arise from an individual case in controversy. Finally, policy guidelines can be suggested by the public and either accepted or rejected by the Commission.

The Mechanics of Policy Formulation. At a regular Thursday meeting of the Commission in executive session, a Commissioner may raise a concern about a particular issue which may not be on the formal agenda.[10] If it is the general opinion that the subject requires policy formulation, a Commissioner may volunteer to develop a "first draft" or a member of the staff may be assigned the responsibility.[11] When a "first draft" policy statement is received, the Commissioners individually review, research and, when necessary, rewrite it. The proposed changes are then discussed in Commission executive session, and further issues are identified. The document is revised until the Commissioners are confident that it fairly represents either the full Commission's views, a majority of the Commissioners' views, or that it is a document suitable for public discussion. A draft is then circulated among the staff for comment and is further revised to reflect those changes suggested by the staff and acceptable to the Commissioners. A proposed policy statement is published in the *Federal Register* and noted in the public calendar[12] to solicit public comment. Depending on the issue involved and the extent of Commission agreement on the policy statement, the policy may serve as interim policy during the comment period. Finally, comments are resolved and the final document made public.[13]

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10. The agenda is prepared by the Vice Chairman, but reflects the desires of all of the Commissioners.

11. Examples of policy statements initiated and drafted by the Commissioners are: General policy statement; sampling plan policy statement; import policy statement; policy statement on section 15 of the Consumer Product Safety Act; and the revision of the meetings policy. Examples of policy statements initiated by Commissioners and drafted at the outset by staff are: The policy regarding staff participation in voluntary standards organizations; the initial meetings policy statement; and the policy governing implementation of the Freedom of Information Act.

12. The public calendar is the principal method by which the CPSC notifies the public of its activities. The public calendar provides advance notice of public hearings, Commission meetings, meetings with outside parties involving matters of substantial interest, selected staff meetings, Advisory Committee meetings, and other events such as speeches and panel discussions.

13. During this process, the Commission may hold a public hearing or public staff briefings to understand further the issue or viewpoints on the issue. For example, public hearings were held on the sampling plan issue. Staff briefing sessions were held on issues such as staff participation in the voluntary standards organizations and the revision of the meetings policy.

In addition to policies being initiated by Commissioners, staff briefing papers discussing issues and options are presented weekly to the Commissioners. By agreement of all Commissioners, these matters are placed on the executive session agenda. Some items may be general policy statements prepared by the staff in recognition of a perceived need,[14] while others may be cases in controversy which raise policy issues not yet covered in general policy statements or decided in previous cases,[15] or matters initiated by a member of the public.[16] After the submission of a first draft statement to the Commissioners, the above six procedures are followed. Therefore, irrespective of who initiated the consideration of a particular policy issue, a majority of the Commissioners must agree on a determination of policy need, a specific policy direction in principle, a draft policy statement for public review and comment, and the final statement reflecting the views of the public, staff, and Commissioners.

The Commission uses various vehicles for communicating final policy determinations to the public. Even where it is not required by law, general policy statements are published in the *Federal Register* in the form of regulations. The Commission has also ensured that the overall intent and direction is codified by moving much of the information traditionally in the preamble to the regulations to the body.[17] To communicate final policy determinations, the official minutes of the Commission, documents such as the Annual Report, the Commission Budget Justification, and testimony of the Chairman on behalf of the Commission before legislative committees are made available to the public.

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14. Examples include the policy on the confidentiality of citizen correspondence, the policy on model state laws, and the policy on dealing with jurisdictional questions.

15. A flammable fabrics case where a decision had to be made regarding the Commission's policy on the export of substandard goods, and a case concerning possible criminal violations under the Hazardous Substances Act where a policy determination concerning who should be subject to the prosecution was required are examples of this kind of staff briefing paper.

16. For example, several trade associations requested that the Commission articulate its view of the preemption clause of the Flammable Fabrics Act, 15 U.S.C. § 1203 (1970). *See also* 15 U.S.C. § 2079 (Supp. III, 1973).

17. For example, section 1001.60 of the proposed amended policy on meetings reads as follows:

> (a) In order for the Consumer Product Safety Commission to properly carry out its mandate to protect the public from unreasonable risks of injury associated with consumer products, the Commission must involve the public to the fullest possible extent in its activities.
>
> (b) To guarantee public confidence in the integrity of its decision-making, the Commission must, to the fullest possible extent, conduct its business in an open manner which is free from any actual or apparent impropriety.
>
> (c) To achieve the goals set forth in paragraphs (a) and (b) of this section, the Commission believes that, wherever practicable, it should notify the public in advance of all meetings involving matters of substantial interest held or attended by its personnel and permit the public to attend such meetings. Furthermore, to ensure the widest possible exposure of the details of such meetings, the Commission should keep records of them which are freely available for inspection by the public.

CPSC Policy on Meetings, Proposed 16 C.F.R. § 1001.60, 39 Fed. Reg. 37781 (1974).

In addition, early in the life of the Commission, the Commissioners agreed that they would each discuss in public forums certain specific policies which had been formulated by the Commission. Further, individual Commissioners often present their views on unresolved issues to explore public responses. The manner in which four specific policies were formulated in the Commission is reviewed below.

The policy on sampling plans concerns whether the Commission should promulgate mandatory safety standards with which each unit of a manufactured product must comply or whether standards should require only that a sample of items from production comply with the standard.[18] The Commission's policy on sampling plans as agreed upon and published for comment is that decisions by the Commission on the use of sampling plans will be made on a case-by-case basis. Sampling plans will be included in Commission regulations where appropriate in view of the combined cost and benefit to consumers, and, where necessary, will specify unambiguously the technical requirements of the regulation and accompanying legal obligations to regulated industries. Sampling plans will not be used when those nonconforming items which may be acceptable under the sampling plan adversely affect the safety of consumers. They will be used, however, in the following order of preference: First, in a program which certifies that the products are manufactured in conformance with the standard; second, in published enforcement rules accompanying the standard; and third, as part of the standard.

It is difficult to determine which of several events prompted the Commission's determination that a general policy statement on sampling plans was necessary.[19] In any event, the steps which followed in formulating the policy are clear. The Commissioners agreed to hold extensive staff briefings and a two-day public hearing in April, 1974, since the issue was sufficiently controversial and complex, and at the public hearing a variety of viewpoints were expressed. Among those represented at the hearing were consumer organizations, individual consumers, voluntary standards organizations, a trial lawyers association, retailers, manufacturers, universities, and government agencies. Following the public hearings, the staff prepared, for review by the Commissioners, a report summarizing the discussion of the issue at the staff briefings and these hearings. At two or three executive sessions the Commissioners discussed and argued the various approaches to a policy on sampling plans. One Commissioner agreed to draft a policy statement which was reviewed and revised by the other Com-

18. CPSC Staff Briefing Package (May 30, 1974).
19. In early 1974 the Commission was considering issuing a children's sleepwear flammability standard in which the staff had included a sampling plan. Members of Congress and the general public had begun to question the wisdom and authority of the Commission to include sampling plans in standards.

missioners. The Commission then approved a policy statement, agreed to publish the statement for comment, and adopted the policy for the interim period.

A second policy issue, freedom of information, confronted the Commission in June, 1973, when it received a request from a member of the public for all submissions of a TV manufacturer to the Commission. This request for information led to a briefing of the Commissioners by the General Counsel on the Freedom of Information Act (FOIA).[20] Individual Commissioners researched the implementation of the Act by other agencies, and the alternative approaches to dealing with the discretionary features of the FOIA. In staff briefing sessions, the Commissioners revealed through comments and questions their desire to conduct business in the open and their desire to develop a policy which reflected that view. To implement the FOIA, the General Counsel drafted proposed regulations which contained a statement of the Commission's intention "to make the fullest policy disclosure of information."[21] The Commission staff is currently reviewing the regulations to take account of public comment.

As another example of policy formulation, several CPSC cases presented the question whether manufacturers of goods for the domestic market, when found to be in violation of a federal standard, should be allowed to export the noncomplying goods. The Commission asked the staff for complete briefing material which would include various policy positions and experiences of the Federal Trade Commission in dealing with this issue. Following a series of sessions during which the Commission discussed and debated the issue with the staff, it adopted a policy that goods which were intended for domestic markets could not be exported if they were found to be in violation of a statute. It was the majority view that this policy would be an incentive to the industry to manufacture only complying goods.

As a final illustration, the Commission has now developed an interim policy with respect to section 15 of the CPSA.[22] The need for a policy statement was raised by, and the statement was developed by, the Commissioners. There are already published regulations governing when and what information must be filed with the Commission when the existence of a substantial product hazard is suspected.[23] By February, 1974, the Commission had received and was in the process

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20. 5 U.S.C. § 552 (1970), *as amended*, 15 U.S.C.A. §§ 552-552a (Pamphlet Supp. I, 1975).

21. CPSA Procedures for Disclosure of Information, Proposed 16 C.F.R. §§ 1015.1-.20, 39 Fed. Reg. 30298 (1974). *See* note 54 *infra* and accompanying text.

22. Section 15 provides that any manufacturer, distributor, or retailer of a consumer product distributed in commerce who obtains information reasonably supporting the conclusion that the product could create a substantial product hazard must inform the Commission unless there is actual knowledge that the Commission has already been adequately informed. 15 U.S.C. § 2064(b) (Supp. III, 1973). After a hearing and determination that the product constitutes a substantial product hazard, the Commission may order notice and repair, replacement, or refund (at the option of the manufacturer, retailer, or distributor). *Id.* §§ 2064(c), (d), (f).

23. 16 C.F.R. § 1025 (1975).

of monitoring over 12 million units which could create substantial product hazards. Although these statistics may appear impressive, the Commissioners determined that there were problems with the manner in which that section of the Act was being implemented. As a result, policy formulation was instituted.

The Commissioner who volunteered to represent the Commission in the development of the policy statement, for the purpose of understanding the staff's concerns and views, first met with the staff responsible for implementing the existing regulations.[24] A draft policy statement was prepared and forwarded to the staff for their views and comments. The major issues were identified in a draft forwarded to the Commissioners for review. There was extended review and discussion of the draft, which resulted in a decision by the Commissioners to depict the intricacies of the policy with alternative flow charts rather than with the narrative language. A series of executive session discussions led to still another draft which was revised and rewritten after comment from all of the Commissioners.

Currently, there are still several basic issues which must be resolved before the policy on section 15 can be finally adopted.[25] The Commission has decided that it would be best to prepare the next draft to identify these unresolved issues. Following this next draft and prior to issuing a final regulation, staff and public views will be sought on all aspects of the proposed and interim policy.

This overview of the manner in which CPSC policy is formulated indicates that, at least with respect to the CPSC, the *Ash Report's* allegations about collegial bodies can be refuted. The *Ash Report* concluded that collegial bodies are inefficient mechanisms for formulating and implementing specific policy. This overview, however, has identified a few of the policies which have been formulated by a collegial body using the various mechanisms available to it. The Commission has at least four sources of policy initiation: Commissioners, staff, cases in controversy, and the public. Furthermore, policy can be developed by the Commissioners themselves, or by the staff for Commission review. In either case there is a role for public participation.

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24. The responsible staffs include the Section 15 Group, the Bureau of Engineering Science, and the General Counsel.

25. For example, under what circumstances should a manufacturer, retailer, or distributor be offered the opportunity to negotiate the terms of a nonbinding plan to correct the product defect (corrective action plan) where violation of the plan could only result in the initiation of hearings? Under what circumstances should the Commission limit the options of the "producer" to either a hearing or a binding corrective action plan with a consent order waiving primarily hearing rights? What should be the nature and extent of public participation in this process?

A second conclusion of the *Ash Report* is that the usual procedure of policy formulation within regulatory agencies is in the context of individual cases. The CPSC, however, formulates most of its policy outside the narrow bounds of individual cases even if a case in controversy initially raises the issue. The Commissioners recognize that policies that are too narrow, after the fact, and at times inconsistent are not constructive guidance for interested parties. In addition, at least with respect to the CPSC, the finding that regulatory agencies underutilize formulation of policy through informal procedures and the issuance of rules and regulations is erroneous.

Finally, there is the contention by the *Ash Report* that coequal commissioners too often have difficulty agreeing on major policy statements or rules and that they tend to avoid the difficult problems. The CPSC Commissioners are no different from any other group of commissioners; there are often difficulties in agreeing on major policy statements. These difficulties, however, do not result in failure to issue a statement. Generally, there is first extensive discussion to convince or, where necessary, to compromise. When compromise is not possible, the Commissioners often feel that additional outside views will be helpful, as was the situation in the sampling plan policy where the staff and public were heavily involved. If there is still no consensus, then a majority of the Commission prevails.

What emerges in all instances where policy issues are identified is a final policy statement reflecting the majority's view of the public interest. This is all the public can expect; this is all any public official can give. This is satisfactory provided the system also allows public scrutiny and alteration of policies if the public officials should prove to have been misguided.

Accountability

In the *Ash Report*, it is contended that a major inadequacy of regulation by a collegial body is that such a body does not and "probably cannot provide for the political accountability required to insure public responsibility."[26] In support, the report states that

> [t]he overseeing of economic regulation by responsible public officials, necessary to assure effective discharge of agency responsibilities, cannot exist if the decisionmakers are immune from public concerns as expressed through their elected representatives. A serious flaw of the collegial structure is an inability to fix responsibility due to the inherent diffusion of authority among relatively anonymous coequal members. In addition, appointment for fixed terms gives commissioners a degree of independence that may serve to protect them from improper influence but was not intended to allow them to become unresponsive. Insulated to a degree from both Congress and the President, these agencies have little support within government

26. Ash Report 40.

> and hence lack one of the major incentives which motivates effective performance.[27]

In many ways, the statutory provisions of the CPSA refute the assumptions implicit in this analysis. In addition, the method by which the Act is implemented, when considered with the statutory provisions, appears to contradict the *Ash Report's* conclusion that a collegial body cannot be sufficiently accountable.

When one raises the issue of accountability, one must also ask the question "accountability to whom?" Although the *Ash Report* includes accountability to Congress as a possible check on regulatory authority, it also takes the position that, in most instances, the only effective form of accountability is that of an organization directed by a single administrator and housed in the executive branch. In short, the *Ash Report* concludes that adequate accountability must be synonymous with accountability to the President.[28]

In reaching this conclusion, the *Ash Report* distinguishes between two types of "congressional and presidential control"[29] in its discussion of accountability: "[R]eview of agency performance, and . . . improper political influence over agency decisions."[30] The *Ash Report*, however, ignores the possibility that the distinctions between "review of agency performance" and "improper political influence over agency decisions" may be blurred in application.[31] Moreover, in contradistinction to the assumptions of the *Ash Report*, a close examination of the statutory provisions of the CPSA reveals that "independence" and adequate "accountability" to the "elected representatives" of the people are not mutually exclusive concepts, when applied to an independent, collegial regulatory commission. Further, an examination of the manner in which the Act is being implemented reveals that there are methods by which the "accountability" of independent regulatory agencies may be facilitated.

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27. *Id.*
28. *Id.* at 40-41.
29. *Id.* at 40.
30. *Id.*
31. The implications of such a blurring were recognized by the Hoover Task Force on Regulatory Commissions which made one of the earliest studies of regulatory agencies:

> If the agency is subject to partisan or political influence or control this will not only defeat the public purposes of regulation and unfairly benefit the influential, but will also tend to impair public confidence in the democratic process and the effectiveness of governmental action generally. Thus, in the interest of fairness to the individual concerned, of the attainment of public objectives, and of the maintenance of the integrity of government, there is a vital necessity for assuring that such regulatory agencies are insulated from partisan influence or control to the maximum extent feasible.

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Statutory Provisions

Both the legislative and the executive branches of government have input into the initial appointment of the CPSC members. Section 4 of the Act provides that the Commissioners are to be appointed by the President, with the advice and consent of the Senate, and that no more than three Commissioners may be affiliated with the same political party. In addition, the Commissioners may not be in the employ of, or hold any official relation to, any person engaged in selling or manufacturing consumer products; own stocks or bonds of substantial value in a person so engaged; or be in any other manner pecuniarily interested in such a person or in a substantial supplier of such a person.[32] The intent is to ensure that those who are appointed as Commissioners are acceptable to the elected representatives of the people in terms of their capabilities, political persuasions, and impartiality with respect to the subjects of their regulation.[33]

The Commission's bipartisan composition, together with the diversity of the Commissioners' backgrounds, protects against the ability of improper influence to insinuate itself and control the Commision's decisions. In effect, the collegial body acts as a check on itself. By requiring that the President designate one member of the Commission as Chairman, who is responsible for the management of the Commission for his or her term of office, the Act addresses itself to the charges, made by almost every study of the "problem of regulatory agencies," of diffusion of management responsibilities and the consequent blurring of accountability.[34] The Commission as a whole must answer for the policies established by the agency; the Chairman must answer for the efficiency and effectiveness with which these policies are implemented.

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32. 15 U.S.C. § 2053(c) (Supp. III, 1973). The employees of the Commission are, of course, subject to Civil Service rules and regulations. Section 4(g)(2) of the Act forbids any employee who is compensated at a rate in excess of the annual rate of basic pay for grade GS-14 of the General Schedule from accepting employment with any manufacturer subject to the Act for a period of one year after terminating employment with the CPSC. 15 U.S.C. § 2053 (g)(2) (Supp. III, 1973). This provision helps ensure a degree of independence for the Commission and is unique to the CPSC. Commission employees are also subject to applicable Civil Service rules and regulations on conflict of interest.

33. The *Ash Report* does not address the possibility of improper partisan control of collegial bodies except to remark that the appointment process of members to a collegial body may lend itself more easily to improper political pressures than would that of a single administrator. In support of this point, the *Ash Report* notes:

> [I]t has become commonplace to hear a commissioner referred to as an "industry man" or a "consumer man" or hear a vacancy labeled as a "Western seat" or a "Southern seat.". . . Indeed, a Commissioner appointed under these circumstances may himself feel that he represents a particular constituency and may be subjected to untoward pressures for that reason."

ASH REPORT 41. The *Ash Report* also asserts that, because such a situation does not exist in the appointment process of a single administrator, there is less likelihood that imroper influence will be exerted. Neither of these points, however, is developed further. The *Report* prefers, instead, to concentrate on developing the consequences that independent collegial bodies hold for adequate "review of agency performance."

34. *See, e.g.*, ASH REPORT; LANDIS REPORT 22.

Section 4 of the CPSA also provides that the President may remove a Commissioner only for neglect of duty or malfeasance in office. This provision, in conjunction with presidential appointment of a Chairman, tends to make the Commission more, rather than less, independent of the executive and legislative branches of government.[35]

The nonpartisan and noneconomic interest requirements of section 4 imply that the process of regulation should be devoid of the improper intrusion of either of these concerns. It appears to follow, therefore, that for an agency to be credible, its statutory provisions should allow it both to be, and to appear to be, removed from improper partisan or economic influence. Thus, establishing a fixed term for the Chairman helps to establish the organization's credibility for directing the Commission's rulemaking and adjudicatory roles in a fair and impartial manner.

Establishing a fixed term for the Chairman, however, does not necessarily eliminate accountability to the executive branch, since the President may remove the Chairman or any Commissioner for malfeasance in office or neglect of duty. If either improper economic or political influence should interfere with a Commissioner's regulatory judgments or if he or she is just not doing the job, the President may call the regulator to account. Therefore, the issue is not whether the Commissioners are accountable to the President, but rather on what basis the Commissioners are accountable to the President.

If the purpose of the CPSC is to protect the public from unreasonable risks of injury associated with consumer products,[36] and if it is not otherwise substantively allied with a particular administration's programs and policies, as appears to be intended by law, then the basis of accountability to the President should properly be removed from the substance of the regulations which are enacted. The situation is analagous to the checks and balances relationship of the elected legislature to the appointed judiciary; the judge is called to account not for the substance of his or her decisions, but for the manner in which they are decided. Accountability in the removal provision therefore exists.[37] In addition, the existence of the power of removal carries weight and its importance is not determined by how often it is used.[38]

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35. Actually, these provisions may have the positive result of causing additional emphasis to be placed on the quality of the initial selection process. The *Ash Report*, however, observes that greater attention is likely to be paid to the appointment of a single administrator and uses that observation to support the conclusion that a single administrator is desirable. ASH REPORT 42.

36. 15 U.S.C. § 2051(b)(1) (Supp. III, 1973).

37. Robert E. Cushman, for instance, notes that "whatever power of control the President has over the independent Commissions will spring from his power to remove members from office." R. Cushman, *The Problem of the Independent Regulatory Commissions*, in IDEAS AND ISSUES IN PUBLIC ADMINISTRATION 152 (D. Waldo ed. 1953).

38. *Id.*

The Commissioners, of course, are individually accountable to Congress through exercise of its oversight function. The subcommittees to which this responsibility is assigned[39] provide a forum in which the activities of the Commission are reviewed, with testimony received from parties affected by the various activities of the Commission. At such hearings, the Commissioners are questioned closely on specific matters. The public nature of this process in itself is a type of accountability. Certainly, the appearance of public witnesses adds to the significance of the process. In certain instances, if public sentiment expresses itself strongly enough to Congress, a special oversight hearing may be scheduled.[40] Also, while Congress does not have removal power, it does have the ability to amend the statute to clarify or modify its intent with respect to the functioning of the agency.[41] In the process of the oversight hearing itself, the subcommittee also has the opportunity to make its views known, informally, to the Commissioners.

A practical demonstration of the accountability of the CPSC occurs annually when it submits and defends its budget request. Section 27(k)(1) of the Act[42] requires that the Commission submit to Congress a copy of any budget estimate or request submitted to the President or the Office of Management and Budget. This procedure reduces the President's direct control over Commission policies to the extent that approval or disapproval may be expressed through specific sums of money allotted for specific tasks or programs.[43]

Nevertheless, the budget provision in the CPSA does not eliminate the President's authority over implementation of the Commission's program. The requirement that the Commission submit its budget request to the Office of Management and Budget and to the Congress simultaneously does not hamper the President from including in his budget request to Congress a sum different from that requested by the Commission.[44]

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39. The Subcommittee on Consumers of the Senate Committee on Commerce and the Subcommittee on Commerce and Finance of the House Committee on Interstate and Foreign Commerce have oversight responsibility for the CPSC. This oversight function has been exercised three times in the brief life of the Commission. The House held oversight hearings on March 25 and 28, 1974, and April 21-24, 1975. The Senate held hearings on February 19, 26, 27, and 28, 1975.

40. Such an event occurred with respect to the CPSC. The issue was the Commission's policy on consumer participation in standards development. A special Senate oversight hearing was scheduled for October 2, 1974; it was postponed, however, and the issue was covered during the regular oversight hearing in February, 1975.

41. Congress can, of course, repeal the legislation establishing the Commission. In fact, in 1974 one such bill was introduced by Representative Earl Landgrebe. H.R. 11717, 93d Cong., 2d Sess. (1974). Although the power of repeal, like the power of removal, is recognizably a power of last resort, its existence holds significance for the accountability of the Commission.

42. 15 U.S.C. § 2076(k) (Supp. III, 1973).

43. Although the ability to control budget requests is an undeniable power, these remarks recognize that the executive budget process is certainly more complicated than a simple funding request for favored programs and no funding request for programs in disfavor. The President has the responsibility of coordinating the programs within his Administration and, in so doing, must set priorities. Programs may fall outside of priority areas, without necessarily being inimical to the Administration.

44. As a matter of fact, the President requested the same sum ($42.8 mil-

The significant difference between the Commission budget request and that of other agencies in the executive branch, which also might have their budget requests reduced by the Office of Management and Budget, is that, pursuant to section 27(k), the Congress has had formal notice of the Commission's request. Therefore, Congress will have at least these two recommendations to factor into its decision. As a practical matter, then, while the unusual budget provision of the CPSA provides a degree of independence, it does not appear to lessen the Commission's accountability to the elected representatives.[45]

In addition to legislative and executive checks on the power of the CPSC, the judiciary acts as a check on Commission decisions to ensure that the Commission has protected the rights of those it is regulating, that the Commission is not exceeding or avoiding its statutory responsibilities,[46] and that when an action of the Commission depends upon a factual record, it is supported by substantial evidence in the record.[47] As with other regulatory agencies, the rules that the Commission promulgates are subject to judicial review. In addition, the judiciary acts as a check on the CPSC to ensure that it is being responsive to the public. Section 10 of the Act allows members of the public to petition the Commission to take a specific action. If the Commission does not act on the petition within 120 days, the petitioner may take the Commission to court to compel it to act on the petition.[48] In addition, section 24 provides for private enforcement of consumer product safety rules and of orders issued under section 15.[49]

Implementation

Accountability to the public may appear too general a proposition to have much meaning. Accountability to the public, however, may be

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lion) as that requested by the Commission for the 1975 fiscal year. For fiscal year 1976, however, the President has requested a different sum ($36.6 million) than that requested by the Commission ($42.8 million). This issue raises an interesting question as to which budget request the Chairman is bound to defend before Congress.

45. An additional executive check on the CPSC's power lies in the section 22 limitation placed on the Commission's ability to go to court to restrain violations of its consumer product safety rules, 15 U.S.C. § 2071(a) (Supp. III, 1973), or of section 19 which outlines prohibited acts. *Id.* § 2068. Also, section 27(j) requires that the Commission submit an annual report to Congress detailing the costs of various specified activities in which it has engaged. *Id.* § 2076(j). Finally, both the executive branch, through the Office of Management and Budget, and the legislative branch, through the General Accounting Office, may audit and review the Commission's procedures and fiscal management.

46. *See* Committee for Handgun Control, Inc. v. CPSC, 388 F. Supp. 216 (D.D.C. 1975).

47. For a succinct, general discussion of the power of judicial review of regulatory agencies, see HOOVER TASK FORCE REPORT 15.

48. 15 U.S.C. § 2059(e)(1) (Supp. III, 1973).

49. *Id.* § 2073.

forged into a meaningful concept by the adoption of specific policies that encourage and maximize the opportunity for diverse segments of the public to participate in an agency's activities. Thus, the Commission has taken a series of steps that are designed to ensure that its regulatory actions may be fully scrutinized both by those affected by its actions as well as by any other interested members of the public. Openness and access to information are therefore key concepts.

The CPSC's proposed policy concerning meetings reflects its policy of openness. This proposed policy[50] states that "[t]o guarantee public confidence in the integrity of its decisionmaking, the Commission must, to the fullest possible extent, conduct its business in an open manner which is free from any actual or apparent impropriety."[51] The CPSC has implemented this requirement by having the Office of the Secretary maintain a public calendar which is available to outside parties on request. Any meeting of the Commission's staff with outside parties on matters of substantial interest must be announced in the public calendar seven days prior to the meeting, which is open to the public. Matters of substantial interest, by definition, include any matter that is pending before the Commission in which the Commission is legally obligated to make a decision.[52] Furthermore, logs or summaries of all meetings between Commission staff and outside parties[53] are written and available to the public.

The Commission's openness policy is also reflected in its liberal interpretation of the FOIA.[54] During calendar year 1974, approximately 400 formal FOIA requests were processed and only 10 were denied. Six of these denials were nondiscretionary under the FOIA. The other four were discretionary exemptions and involved documents containing information about specific Commission legal strategy or enforcement action.[55] This policy of openness extends also to the CPSC's adjudicative proceedings. The Commission has stated in its proposed policy and interim rules of practice[56] that the Commission's

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50. *See* 39 Fed. Reg. 37780 (1974).
51. CPSC Amended Policy on Meetings, Proposed 16 C.F.R. §§ 1001.60-.67, 39 Fed. Reg. 37781 (1974).
52. *Id.* § 1001.61(f).
53. This is required by 15 U.S.C. § 2076(j)(8) (Supp. III, 1973).
54. The proposed interim guidelines state:

> The Commission, recognizing the fact that public participation can be best realized when members of the public can readily gain access to Commission information and records, states that its policy is to make the fullest possible disclosure of information to any person who requests, without unjustifiable expense or delay. Information exempted from disclosure under the Freedom of Information Act may, when not prohibited by law, nevertheless be made available when the Commission determines that disclosure is in the public interest.

CPSC Policy on Disclosure of Information, 39 Fed. Reg. 30298 (1974).
In an attempt to equalize the possibilities of access to material, the proposed policy and interim guidelines provide that "[t]here shall be no fee charged for services rendered in connection with the production or disclosure of records" unless the charges are in excess of $25.00. Proposed 16 C.F.R. § 1015.9(c), 39 Fed. Reg. 30299 (1974). The schedule for calculating the charge is contained in § 1015.9(f).
55. *See* CPSC, Annual Report on the Administration of the Freedom of Information Act (1974).
56. CPSC Rules on Adjudicative Proceedings, Proposed 16 C.F.R. §§ 1025.1-.82, 39 Fed. Reg. 26848 (1974).

policy is "to allow intervention in adjudicative proceedings to the greatest extent practicable."[57] The interim rules of practice stress the importance of dispatch in the settlement of disputes; however, the Commission has also provided for a maximization of the public's ability to participate.[58]

The Commission meets every week in executive session to vote on the issues requiring a Commission decision. Although these meetings are closed,[59] they provide a forum at which the various issues are discussed. The results of these exchanges are recorded in executive session minutes, where the issues are framed, the alternatives which were considered are outlined, and the vote of each Commissioner is recorded. These minutes are public documents. Therefore, it is possible for Congress, in the exercise of its oversight function, or anyone else, to determine responsibility for the Commission's regulatory decisions. The CPSC's statutory advisory council, provided for in section 28 of the Act, must be composed of 15 members, of whom five must be selected from governmental agencies, five from consumer product industries, including at least one representative of small business, and five from consumer or community organizations.[60] The purpose of the council is to advise the CPSC and to serve as a sounding board on major policies, approaches to particular product safety issues and problems, and significant administrative actions. There appears to be an attempt, as indicated by the membership provision of section 28, to balance the advice that the Commission receives. Exclusive access by a particular group to an agency is not in the public interest. The Commission reasoned further that, if the advice that the council is intended to give is to be "representative" of various affected interests, it would be preferable for the advisors to be as diverse as possible within the statutorily required categories. To maximize the Commission's access to varied views, therefore, the Commission decided to invite applications from the public at large.

The CPSA, in section 7, requires that the Commission solicit outside groups to develop proposed consumer product safety standards. Further, it requires that all interested parties be given the opportunity

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57. *Id.* As with the meetings policy, the publication of these proposed rules of practice was not required by law. *See* 5 U.S.C. § 553(b) (1970). The Commission decided to seek comment on these rules of practice in order to ensure that its regulatory posture would be open to scrutiny and, if necessary, to criticism and appropriate codification.

58. With respect to its one adjudicative proceeding to date, the Commission, in its order denying an interlocutory appeal, allowed the administrative law judge to authorize payment of travel and expenses of a public interest attorney to those places outside of Washington, D.C., where the judge found it necessary to hold hearings. Minutes of CPSC Executive Session, Sept. 30, 1974.

59. The closing of executive sessions to the public is the only routine exception to the open meetings policy.

60. 15 U.S.C. § 2077 (Supp. III, 1973).

to participate in the development of consumer product safety standards.[61] To encourage public involvement, the Commission issues a press release at the initiation of a proceeding, in addition to publishing a notice in the *Federal Register*. The Commission also maintains a list of all parties who have indicated an interest in being offerors or in participating in the development of standards so that copies of the *Federal Register* notice and the press release can be sent to them.[62] Thus, the Commission intends that the offeror process reflect the interests of the various affected parties from the beginning of a standards development process. The due process provided by the right to comment after a standard is proposed, as set forth in the Administrative Procedure Act,[63] is a more significant right when interested parties have participated in the actual development of the standard. In this manner, there is assurance that the implications of the issues and the various, inevitable trade-offs being made are understood and will be exposed to public scrutiny.

The Commissioners routinely meet with members of the press[64] to brief them on Commission decisions. The Commissioners also discuss reasons for the decisions made and are open to any questions concerning other Commission activities that might be raised by the reporters. In this manner, the Commission hopes to convey news of its actions to the largest possible portion of the public, and indirectly encourage public participation. The Commission has also instituted a simple procedure for petitioning it to take specific actions.[65] A letter addressed to the Commission outlining a program and requesting certain action is sufficient to qualify as a petition.

With the implementation of these complementary components of the Commssion's openness policy, the likelihood increases that the public will hold the Commission responsible for its actions. With the degree of public participation that these policies allow, it is impossible for the decision-makers of the CPSC to be "immune from public concerns," as the *Ash Report* feared would necessarily occur with independent collegial bodies.[66] Further, the openness, together with the knowledge that the CPSC's work will be closely reviewed, provide a major incentive which "motivates effective performance."[67] The *Ash Report* found such motivation lacking when agencies are independent.

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61. *Id.* § 2056. In its regulations governing the implementation of section 7, the Commission states ". . . standards development activities by offerors will be open to the public and will afford the opportunity for any interested person to participate in the development of standards." 16 C.F.R. § 1105.1(a) (1975).
62. 16 C.F.R. § 1105.1(g) (1975).
63. 5 U.S.C. § 553 (1970).
64. This weekly session is known as the Monday "Muncheon"; it is an informal, bring-your-own-lunch meeting between Commissioners and members of the press, and is open to interested outside parties.
65. The CPSA provides in section 10 that "any interested person, including a consumer or consumer organization, may petition the Commission to commence a proceeding for the issuance, amendment or revocation of a consumer product safety rule." 15 U.S.C. § 2059(a) (Supp. III, 1973).
66. ASH REPORT 40.
67. *Id.*

It is the interested parties—those affected by the Commission's regulatory action, including segments of the consuming public—that often will direct legislative and executive attention both to the general policies of the Commission and to the specific actions implementing those policies. In addition, the pressure that members of the public place on their elected representatives, with respect to those specific policies or actions which they perceive either to affect their interests adversely or to be necessary to protect their interests, will result in closer scrutiny of the Commission's activities by both branches. As a result of the Commission's openness policy, the ability of affected parties to bring this pressure is enhanced. Thus, the oversight function of the Congress can be exercised with some understanding of the circumstances surrounding a given decision and with a knowledge of who the responsible Commissioners were. Finally, since the elected representatives are responsive to their constituents, they should not pay "inadequate attention"[68] to the legislative and budget proposals of the Commission, notwithstanding *Ash Report* claims that this occurs when an agency is independent.

The issue of accountability goes to the heart of the democratic process rather than to the structure of any particular agency. The CPSC's statutorily established "independence" does not in itself free the Commission from accountability. As demonstrated, accountability on many levels is woven into the statute. Further, that the Commission, as a matter of policy, has chosen not to insulate itself from the public increases the accountability that is provided by law.

Management Effectiveness and Quality

The "effectiveness of management" and the "ability to attract and retain able personnel" are reported in the *Ash Report* to be important indicia of an administrative agency's organizational health.[69] These twin aspects of regulatory administration also have been of major concern to those individuals and groups that have periodically studied these agencies throughout the twentieth century.[70] For example, the first Hoover Commission[71] focused its entire report on issues of management efficiency and quality, and the Landis Report[72] was concerned "quite heavily" with the "qualifications that should be

68. *Id.*
69. *Id.* at 34-39, 41-44.
70. *See id.* at 26.
71. *See* COMM'N ON ORGANIZATION OF THE EXECUTIVE BRANCH OF GOV'T, REPORT (1949). The task force study prepared for the use of the Hoover Commission devoted a major chapter of its "General Recommendations" section to "Internal Organization and Administration." HOOVER TASK FORCE REPORT 39.
72. LANDIS REPORT.

required of the men called upon to man these agencies."[73] As a result of this historical emphasis on management effectiveness and quality as the touchstone of regulatory agency reform, it is useful to explore its treatment in the *Ash Report* and its relationship to the CPSC. Whether or not the *Ash Report* has correctly concluded that "changes in regulatory structure can and indeed should be implemented in advance of changes in substantive [agency] law,"[74] it appears obvious that the debate over possible organizational alterations to administrative agencies will continue.[75]

The Ash Report

Collegial bodies are the dominant organizational form of the independent regulatory agencies. It is a central thesis of the *Ash Report* that "[c]ollegial bodies are not an efficient form of managing operations"[76] because there is an ambiguity of direction inherent in the separate authority vested in each of the members, aggravated by the formation of individual commissioner-staff alliances;[77] collegial bodies are often characterized by extensive deliberation, multiple and conflicting values, and disparate views;[78] they are frequently reluctant to delegate authority or relinquish control even "over the most picayune phases of personnel and business management;"[79] and they have failed to establish adequate planning or guidance for the future conduct of their regulatory activity.[80] The consequences of the collegial body's ineffectiveness as a management form are described by the *Ash Report* as quite disturbing, since agencies structured in this manner are unable to coordinate their actions with other government agencies;[81] inflexible and not quickly adaptable to important changes in technology, economic trends, or industry structure;[82] and operating

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73. *Id.*, Letter of Transmittal, at ix.

74. ASH REPORT, Letter of Transmittal, at iii. Noll, for instance, firmly believes that the regulatory process is "inherently flawed, regardless of the form of organization of the regulatory agencies." Noll, *supra* note 2, at vii.

75. *See* S.J. Res. 253, 93d Cong., 2d Sess. (1974), which would create a National Commission on Regulatory Reform with two basic duties, the second of which would be "to make recommendations within two years to the Congress and the President on methods of improving the independent regulatory agencies and the regulatory structure." 120 CONG. REC. S 1897 (daily ed. Oct. 11, 1974) (remarks of Sen. Magnuson). *See also* National Commission on Regulatory Reform Act of 1974, S. 4145, 93d Cong., 2d Sess. (1974).

76. ASH REPORT 34-35. Insofar as the *Ash Report* was concerned, the first Hoover Commission stated it best when it concluded that "[a]dministration by a plural executive is universally regarded as inefficient." *Id.* at 36, *quoting* HOOVER REPORT 5.

77. ASH REPORT 35, 43.

78. *Id.* at 36.

79. *Id.*, *quoting* DEPARTMENT OF JUSTICE, FINAL REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURES 21 (1941).

80. ASH REPORT, *quoting* HOOVER REPORT 4. This problem is said to stem from the "overjudicialization" of the agency process flowing from its court-like, case-by-case mode of operation. ASH REPORT 36. *But see* Lazarus & Onek, *supra* note 2 (criticizing the suggestion of the *Ash Report* to create an Administrative Court).

81. ASH REPORT 37. *But see* Noll, *supra* note 2, at 30-31, arguing that outright merger or closer coordination of agencies in a particular field might only aggravate the disturbing anticompetitive aspects of present regulatory policy.

82. ASH REPORT 38. Such problems, ascribed by the *Ash Report* to commissions, can also plague an entrenched staff bureaucracy. *See* R. FELLMETH,

in an excessively legalistic environment, at the expense of needed expertise in economics, environmental and engineering sciences, and related disciplines.[83]

The *Ash Report* also concludes that "talented executives have been deterred from accepting appointments to commissions because of these structural deficiencies."[84] Among the reasons assigned for this failure in managerial quality in such collegial agencies are that sharing management responsibility with coequals impedes creative initiative and prevents individual recognition,[85] and that such diffuse responsibility minimizes individual discretion to act, and engenders, at the staff level, divided loyalties and morale problems.[86] As a result, the *Ash Report* expressed a belief that, in general, appointments to the agencies have been without distinction and based on considerations of "balance, whether industry, political or geographic."[87]

The primary reform suggested by the *Ash Report* as a remedy for these problems with respect to management effectiveness and quality is the abolition of the collegial body in favor of a single administrator[88] with limited powers of case review.[89] The *Report* suggests that the following advantages would flow from the appointment of such single administrators: The single agency head, unhampered by the necessity for achieving agreement among a majority of commissioners, could

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NADER STUDY GROUP REPORT ON THE INTERSTATE COMMERCE COMMISSION (1970), describing the tenure of the top ICC staff as averaging about 30 years and concluding that they share:

> a protective attitude toward the transportation industry. They are afraid of change. The image they have of transportation is set not in the booming 1960's but in the days of the Great Depression. These men are in positions of great responsibility and their presence is felt in many ways.

Id. at 14.

83. ASH REPORT 39.
84. *Id.* at 42.
85. *Id.* at 42.
86. *Id.* at 42-43.
87. *Id.* at 92.
88. In arriving at its recommendation for a single administrator, the *Ash Report* considered but rejected several alternative structural reforms, including a reduction in the number of commissioners (rejected as not substantially altering the collegial form), and statutory placement of all administrative functions in the chairman with other commissioners limited to policy formulation (rejected as creating an artificial cleavage and ambiguity of function). ASH REPORT 42-43.
89. *Id.* at 33-34, 44. The *Ash Report* also suggests the realignment of existing agencies into larger, more comprehensive master-agencies under the leadership of a single administrator, the retention of the collegial form in the communications and antitrust fields "for reasons supervening the advantages of a single administrator," and limiting agency review of proceedings in time and scope with final appeals from agency action made to a newly created Administrative Court of the United States. *Id.* at 5-7. *But see* Lazarus & Onek, *supra* note 2. Although the discussion in this section concentrates on the suggestion for a single administrator because that is offered as the primary means of increasing management effectiveness and quality, other aspects of the *Ash Report's* recommendations bearing on the management issue are evaluated in the text, *supra*.

respond to the necessity for coordination among government agencies in a timely and effective way, speaking authoritatively for the agency and adjusting his or her position as conditions require;[90] the single administrator could respond more flexibly and adapt more quickly to change, without the necessity of gathering a majority, and thus "could develop more efficient procedures for handling complaints, cases, and the like . . . [and] also adopt innovations for constructive consultation with the public and the regulated industry";[91] and the single administrator with limited powers of case review "could effectively change the legalistic milieu that pervades regulation today . . . [and thereby obtain] more time to direct attention to setting priorities, formulating anticipatory policies, and addressing the many and varied socioeconomic factors affecting regulation."[92] Moreover, the *Ash Report* suggests that the opportunity to serve as the sole administrator of a regulatory agency would magnify the challenge that collegial administration subordinates, and thereby increase the ability to attract able personnel to such a position.[93] Since the history of the creation of the CPSC, as well as its current structure and mode of operation, provides a living experiment against which the wisdom of some of the *Ash Report's* largely unsupported conclusions as to management effectiveness and quality can be tested, it is appropriate that the CPSC's structure be examined.[94]

The CPSC and the Ash Report

The *Final Report* culminating the two-year study of the National Commission on Product Safety initiated the legislation that resulted in the CPSA.[95] The National Commission had recommended the establishment of an independent product safety regulatory agency, and legislation embodying its recommendations was promptly introduced in Congress.[96] The Nixon administration also submitted pro-

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90. ASH REPORT 38.

91. *Id.* But as Noll has commented, "[p]erhaps the most outstanding characteristic of the Ash Report is the absence of factual or analytical evidence for most of the conclusions reached by the Council about both the principal failings of regulation and the cause of these failings." Noll, *supra* note 2, at 12. This void is especially pronounced with respect to this particular attempt to extoll the virtues of the single administrator.

92. ASH REPORT 39.

93. *Id.* at 42. And it is undoubtedly true, as the *Ash Report* points out, that "it would clearly be easier to find one highly qualified executive than it is to find five, seven or eleven for a single agency." *Id.*

94. Limited space forecloses an examination of the Commission in light of some of the *Ash Report's* criticisms of collegial bodies. For most of these, the limited experience of the 2-year-old Commission would, in any event, render any such analysis premature. For others, however, such as the growing problem of delay, the *Ash Report's* criticisms, although not of major significance, nevertheless appear sound.

95. *See* NATIONAL COMMISSION ON PRODUCT SAFETY, FINAL REPORT (1970). The legislative history of the Consumer Product Safety Act is succinctly summarized in BNA, THE CONSUMER PRODUCT SAFETY ACT, ch. II (1973).

96. Bills were introduced by Senators Magnuson and Moss during the closing weeks of the 91st Congress, S. 4045, 91st Cong., 2d Sess. (1970), and at the opening of the 92nd, S. 983, 92d Cong., 1st Sess. (1971). Similar action followed in the House. *See* H.R. 18208, 91st Cong., 2d Sess. (1970) (O'Hara);

posed legislation in 1971, but its bill included a strong recommendation for establishing a consumer product safety program within the Department of Health, Education, and Welfare in an expanded reorganization of the Food and Drug Administration (FDA).[97] Thus, much of the debate over the establishment of a rejuvenated product safety program concerned the virtues and liabilities of creating a new independent agency as opposed to an expanded unit within a Cabinet-level department, and the performance of the FDA under the leadership of the single administrator favored by the *Ash Report*.

The House Report argued for an independent agency, in part because of studies which cited the FDA's inefficient conduct and "identified structural shortcomings in FDA, citing inadequacies in internal procedures and organization."[98] Although rejecting the

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H.R. 260, 92d Cong., 1st Sess. (1971) (Murphy); H.R. 8157, 92d Cong., 1st Sess. (1971) (Moss).

97. *See* H.R. 8110, 92d Cong., 1st Sess. (1971); S. 1977, 92d Cong., 1st Sess. (1971).

98. H.R. REP. No. 1153, 92d Cong., 2d Sess. 25 (1972). Senator Montoya, on the floor of the Senate, stated:

> [M]ost of my dealings with FDA make me conclude that the agency requires elementary restructuring in the public interest. Stripping it of much of its consumer protection functions and reposing them in a separate consumer protection agency seems to be the only reasonable solution. . . . FDA's failures at public expense are appalling, inexcusable, and intolerable. . . .
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> . . . .
>
> A disgraceful example of FDA inability or unwillingness to enforce strong consumer protection laws revolves around the Poison Prevention Packaging Act of 1970, requiring childproof safety closures on products containing substances potentially harmful to small children if ingested.
>
> It has taken FDA 18 months to guarantee even minimal compliance. . . .
>
> It took FDA . . . more than 11 months to publish a testing protocol. Today, even though several categories of products are under final orders as published in the Federal Register, not a single safety closure to protect children is being marketed and sold as a direct result of FDA enforcement of this law.
>
> It will be the middle of August, at the earliest, when FDA enforcement results in even one product, aspirin, being sold equipped with a safety closure that meets requirements under the law. Meanwhile, children under age 5 die at a rate of approximately one daily, and at least one other is crippled daily.

118 CONG. REC. 21868 (1972) (remarks of Senator Montoya).

Similar sentiments have been expressed by others:

> FDA is often criticized as being too cautious and too protective of business. For example, the FDA waited about a year before taking any action on toy safety. Then, three shopping days before Christmas in 1970, it published a long list of toys regarded as unsafe—too late, of course, for the safety information to have much effect on Christmastime toys sales. Furthermore, the FDA has the power to establish procedures whereby parents purchasing unsafe toys can receive a full refund of the purchase price; however, the FDA did not act under this authority, and so no provision was made for parents to return unsafe toys that they had purchased before the FDA list was published.

Noll, *supra* note 2, at 54 (footnote omitted). The Repurchase of Banned Hazardous Substances regulations, referred to by Noll, were proposed by the

single administrator of the *Ash Report*,[99] Congress accepted the need for strong, centralized leadership.

Sections 4(f) and 4(g) of the CPSA[100] detail the comprehensive and important managerial powers of the Chairman.[101] By statute, he or she is the Commission's "principal executive officer," exercising "all of the executive and administrative functions of the Commission," in-

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Commission on August 3, 1973 (within 10 weeks of its formation), and adopted six months later on February 4, 1974. 39 Fed. Reg. 4469 (1974).

99. Actually, the Senate, unlike the House, had provided for a single Administrator to head the independent agency it sought to create. That agency, to be known as the Food, Drug, and Consumer Product Agency, had responsibilities far beyond the consumer product safety functions of the House bill which was eventually enacted into law. The Senate's agency also embraced within it a Commission of Foods and Nutrition, a Commission of Drugs, a Commission of Veterinary Medicine, and a Commission of Consumer Products, each intended to be headed by a Commissioner appointed by the Administrator but vested with substantial delegated authority. *See* S. Rep. No. 749, 92d Cong., 2d Sess. 15-16 (1972). At conference, the Senate abandoned its entire scheme and acceded to the Commission structure of the House bill. *See* H.R. Rep. No. 1593, 92d Cong., 2d Sess. 32-33 (1972).

100. Section 4(f) provides:

> (1) The Chairman of the Commission shall be the principal executive officer of the Commission, and he shall exercise all of the executive and administrative functions of the Commission, including functions of the Commission with respect to (A) the appointment and supervision of personnel employed under the Commission (other than personnel employed regularly and full time in the immediate offices of commissioners other than the Chairman), (B) the distribution of business among personnel appointed and supervised by the Chairman and among administrative units of the Commission, and (C) the use and expenditure of funds.
>
> (2) In carrying out any of his functions under the provisions of this subsection the Chairman shall be governed by general policies of the Commission and by such regulatory decisions, findings, and determinations as the Commission may by law be authorized to make.

15 U.S.C. § 2053(f) (Supp. III, 1973). Section 4(g) provides:

> (1) The Chairman, subject to the approval of the Commission, shall appoint an Executive Director, a General Counsel, a Director of Engineering Sciences, a Director of Epidemiology, and a Director of Information. No individual so appointed may receive pay in excess of the annual rate of basic pay in effect for grade GS-18 of the General Schedule.
>
> (2) The Chairman, subject to subsection (f)(2) of this section, may employ such other officers and employees (including attorneys) as are necessary in the execution of the Commission's functions. No full-time officer or employee of the Commission who was at anytime during the 12 months preceding the termination of his employment with the Commission compensated at a rate in excess of the annual rate of basic pay in effect for grade GS-14 of the General Schedule, shall accept employment or compensation from any manufacturer subject to this Act, for a period of 12 months after terminating employment with the Commission.

15 U.S.C. § 2053(g) (Supp. III, 1973). *See also* notes 34-36 *supra* and accompanying text.

101. Although the all-inclusive managerial powers of the Chairman "shall be governed by general policies of the Commission," as discussed in the text, *infra*, in at least one respect—preparation of the Commission's simultaneous budget submissions to the President and Congress under section 27(k)(1) of the Act, 15 U.S.C. § 2076(k) (Supp. III, 1973)—this managerial discretion has proven unduly broad. For this reason, the four Commissioners, over the Chairman's dissent, have submitted to Congress a proposed legislative amendment to section 4(f) of the Act providing that:

> Requests or estimates for regular, supplemental, or deficiency appropriations for the Commission shall require the approval of the Commission prior to their submission pursuant to Section 27(k)(1).

S. 1000, 94th Cong., 1st Sess. § 4(a) (1975), *reprinted in* 121 Cong. Rec. S 3380 (daily ed. Mar. 7, 1975).

cluding "the appointment and supervision" of virtually all personnel and "the distribution of business" among such personnel and "among administrative units of the Commission," and "the use and expenditure of funds." On these sweeping managerial powers the Act imposes two significant limitations. When performing his functions the Chairman is governed by the Commission's general policies and by the Commission's regulatory decisions, findings, and determinations.[102] In addition, the Chairman's appointments to the positions of Executive Director, General Counsel, Director of Engineering Sciences, Director of Epidemiology, and Director of Information are "subject to the approval of the Commission."[103]

Under this Act, there is no groping for a majority prior to taking administrative action. The Chairman has the power to do virtually everything with respect to managing the Commission that the highly touted single administrator of the *Ash Report* would be able to do. In fact, the Chairman has in some respects greater freedom to act than the *Ash Report's* single administrator, since, with the exception of the two aforementioned limitations, in the absence of "neglect of duty or malfeasance in office"[104] not even the President, who designated the Chairman, may dismiss him.[105]

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102. This "policy" limitation on the otherwise unfettered administrative powers of the Chairman may be significant. To the extent that it impinges on the management authority of the Chairman, and thereby weakens the Chairman compared with his single-administrator counterpart of the *Ash Report*, it is a diminution of managerial effectiveness well worth suffering in exchange for the enhanced vigor of the more important policy-setting functions of the Commission as a whole.

103. The Commission has insisted, with the general support of the Congress and in the face of general opposition from the White House and the Civil Service Commission, that its status as an "independent" agency makes it improper for it to hire for these and other top-level positions only individuals who have received "political clearance" from the White House. *See* 2 BNA PROD. SAFETY & LIABILITY REP. 1019 (1974). It is the Commission's view that these Commission officers must be committed to the Commission's product safety policy, and that whether they support the Administration's general policies is irrelevant to their suitability for their positions.

In an attempt to incorporate this viewpoint into the Act, the Commission has caused an amendment, S. 1000, 94th Cong., 1st Sess. (1975), to be introduced in Congress which would enable the Chairman, subject to Commission approval, to establish and fill non-career executive assignment positions according to criteria consistent with the role of an independent regulatory agency. S. 1000, which, if enacted, would represent an important departure from current practice, also provides that:

> No officer or agency, other than the Civil Service Commission for the purpose of evaluating professional qualifications, shall have any authority to require the Chairman or the Commission to obtain approval for the appointment, employment, or promotion of any individual to the Commission.

S. 1000, 94th Cong., 1st Sess. § 4(a) (1975), *reprinted in* 121 CONG. REC. S 3380 (daily ed. Mar. 7, 1975). Such a provision, freeing the selection of top staff from the vagaries of the White House "political clearance process," would further enhance the management effectiveness of the Chairman, the Commission's "principal executive officer."

104. 15 U.S.C. § 2053(a) (Supp. III, 1973).

105. The current Chairman of the Commission, Richard O. Simpson, is only

As a result of this job tenure and expansive listing of administrative powers, there is no reason to believe that there will be greater difficulty in attracting and retaining as Chairman the services of individuals of superior managerial capabilities than there would be in filling the post of the *Ash Report's* model single administrator.[106] Nor, contrary to the *Ash Report's* suggestion, is it inevitable that the independence of such a regulatory agency will deprive it of budgetary resources sufficient to attract and retain a well qualified staff. One study of the budgets and numbers of employees since 1945 of the seven independent agencies examined in the *Ash Report* concluded that during the 25-year period ending in 1970 these agencies had a number of distinct budget cycles. In the period between 1955 and 1964, for example, the study found that the agencies' appropriations tripled and employment increased by 40 to 100 percent, a boom which applied to all agencies and which carried through two administrations, one Republican and one Democratic.[107]

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serving until October, 1975. His successor will serve a full 7-year term, as will Mr. Simpson should he be reappointed. *See* 15 U.S.C. § 2054(a) (Supp. III, 1973).

106. Nor should the limitations found in sections 4(c) and 4(g)(2) of the Act pose insurmountable obstacles to the attraction of quality personnel. 15 U.S.C. §§ 2053(c), (g)(2) (Supp. III, 1973). These sections generally bar individuals with pecuniary ties to, or official relationships with, manufacturers of consumer products and their suppliers, or who engage in any other business, vocation, or employment, from being Commissioners, and further bar top-level employees from seeking employment with manufacturers of consumer products for a year after terminating their Commission jobs. To the extent that these provisions actually strengthen the integrity of the Commission and its decision-making process, such positions should become even more attractive to highly qualified individuals.

Neither should the quality of the Commissioners serving with the Chairman necessarily suffer as a result of the substantial administrative powers given the Chairman. As the task force reporting to the first Hoover Commission recognized:

> One objection sometimes made to strengthening the office of Chairman . . . is that it will reduce the status of the other members and make it more difficult to attract good men. This objection seems to us unsound and refuted by experience. Actually, this proposal does not derogate from the importance or equality of the other Commissioners. Each member will have undiminished authority on all substantive policies and decisions and on basic administrative matters. In fact their participation in substantive action will be facilitated by freedom from partial and shared responsibility for administrative details.
>
> Able and intelligent men will recognize that a committee is not well fitted for administration and that centering that responsibility in the Chairman does not derogate from the standing or authority of the other members. Indeed, competent men are more likely to be willing to serve where a Commission is well run under an able Chairman than where it is badly managed and no one has the necessary authority to correct the situation.

HOOVER TASK FORCE REPORT 47. Of course, a Commissioner must be afforded an opportunity to participate vigorously in the decision-making and policy-setting aspects of the Commission's program. Without that opportunity, the role is devoid of substance; with it, and with an able administrator as Chairman, a Commissioner's position can be rewarding.

107. Noll, *supra* note 2, at 81-82. The CPSC, although it has suffered some temporary setbacks on budgetary matters, *see* 3 BNA PROD. SAFETY & LIABILITY REP. 3 (1975), has recently had introduced a bill proposing a budget increase to $51 million for fiscal year 1976. S. 1000, 94th Cong., 1st Sess. § 2 (1975), *reprinted* in 121 CONG. REC. S 3380 (daily ed. Mar. 7, 1975).

Finally, the *Ash Report* condemned collegial agencies for their inability to coordinate their actions with other interested bodies.[108] Interagency coordination is especially critical for the CPSC, whose jurisdiction over the safety characteristics of consumer products has been estimated to embrace over 10,000 items. For example, when problems recently arose with respect to the carcinogenicity of vinyl chloride monomer, used as a propellant in aerosolized products, although the Commission was authorized to take appropriate action on household items such as spray paints,[109] the Environmental Protection Agency (EPA) handled similarly formulated aerosolized pesticides[110] and the Occupational Safety and Health Administration (OSHA) acted to protect the workers who manufactured it.[111] In the vinyl chloride case, in addition to many others, contrary to the experience of other agencies and the dire predictions of the *Ash Report*, there has been effective interagency coordination. The Commission has already established formal federal liaison programs with the FDA, EPA, OSHA, Department of Transportation (DOT), Federal Trade Commission (FTC), General Services Administration, and Department of Housing and Urban Development (HUD).[112] A liaison coordinator has been designated in each of these agencies, and regular meetings have been scheduled to resolve jurisdictional issues and settle substantive questions.[113] As a result of these meetings, formal interagency agreements have been signed with DOT, FDA, National Bureau of Standards, National Library of Medicine, National Agriculture Library, and OSHA.[114] Other liaison contacts include the

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108. [C]oordination is impeded, if not frustrated, by the requirement that a majority position be reached before a Commission can participate on a cooperative basis with another agency. The traditional reluctance of one agency to concede jurisdiction to another is exacerbated when negotiations with another agency must be approved, as now, by a multi-member Commission. Consequently, most efforts at policy coordination take place as a result of statutory requirements of consultation. . . .

ASH REPORT 37. Section 29(c) of the Consumer Product Safety Act, 15 U.S.C. § 2078(c) (Supp. III, 1973), is such a statutory exhortation, requiring that the Commission and the heads of other departments and agencies engaged in administering programs related to product safety shall, to the maximum extent practicable, cooperate and consult in order to ensure fully coordinated efforts. *Id.*

109. *See* 16 C.F.R. § 1500.17(a)(10) (1975), regulating such products under the authority of the Federal Hazardous Substances Act, 15 U.S.C. § 1261 (1970), one of several statutes administered and enforced by the Commission. *See* 15 U.S.C. § 2079(a) (Supp. III, 1973).

110. *See* 15 U.S.C. § 2052(a)(1)(D) (Supp. III, 1973).

111. *See* 15 U.S.C. § 2080 (Supp. III, 1973).

112. 1974 CPSC ANN. REP. 53.

113. For example, notwithstanding the *Ash Report's* characterization of collegial agencies as rarely willing to concede jurisdiction to another agency, the Commission has recently done so, despite its grant of some authority in the area, when it agreed that EPA was better suited to regulate child-resistant closures on pesticide containers. *See* 2 BNA PROD. SAFETY & LIABILITY REP. 998-99 (1974).

114. 1974 CPSC ANN. REP. 53. Summaries of what occurred at each of

Department of Defense, the National Highway Traffic Safety Administration, the Coast Guard, the Federal Power Commission, the National Institute of Occupational Safety and Health, and the Communicable Disease Center.[115] In fact, during the last six months of 1974, liaison meetings between staff members of these agencies and the CPSC took place on the average of once every other week and explored the boundaries of agency coordination on several diverse issues.[116]

Thus, while not ignoring the *Ash Report*, Congress failed to accept its organization recommendations totally when creating the CPSC. When it came to instituting a comprehensive regulatory program for product safety, Congress examined the *Ash Report's* executive branch single administrator, as embodied in the FDA, and found it wanting. It turned instead to the creation of an independent, collegial agency, the Consumer Product Safety Commission. In that agency, Congress, for many of the reasons suggested by the *Ash Report*, installed a Chairman with the broad managerial powers of a single administrator. While it is too early to ascertain whether the combination of powers found in the CPSC represents a significant organizational improvement over earlier efforts, or whether, instead, the degree to which the Commission has been able to operate effectively within its collegial form is merely a pleasant but passing attribute of an agency in the early stages of its "life-cycle",[117] the possibility that some progress may have been made in ensuring "management effectiveness and quality" in at least one independent agency is an encouraging first step toward more meaningful regulatory reform.

Conclusion

In 1971 the Ash Council contended that a basic problem with government regulation is that the present regulatory structures are inappropriate. Specifically, the Council viewed the collegial form as both ineffective and unresponsive. A review of the CPSC's ex-

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these meetings, and indeed at all meetings of Commissioners or staff with third parties, are publicly available in the Office of the Commission's Secretary, in accordance with the Commission's "open meetings" policy. *See* notes 50-53 *supra* and accompanying text.

115. 1974 CPSC ANN. REP. 53.

116. CPSC staff members met to discuss coordinating regulation of noise (with EPA on August 13, 1974), lead in paint (with HEW and HUD on October 8, 1974), asbestos standards (with FTC on October 11, 1974), and plastics flammability (with FTC on October 17, 1974). *See* Master Calendar, Office of the Secretary, CPSC.

117. Professor Galbraith describes an agency's "life cycle" as follows:

> Regulatory bodies, like the people who comprise them [*sic*], have a marked life cycle. In youth, they are vigorous, aggressive, evangelistic, and even tolerant. Later they mellow, and in old age—after a matter of ten or fifteen years—they become, with some exception, either an arm of the industry they are regulating or senile.

As quoted in W. CARY, POLITICS AND THE REGULATORY AGENCIES 2 (1967). *See also* M. BERNSTEIN, REGULATING BUSINESS BY INDEPENDENT COMMISSION 74 (1955). *But see* G. KOLKO, THE TRIUMPH OF CONSERVATISM 271 (1963).

perience, and application of the same criteria as those applied by the Ash Council, does not support the Ash Council's basic contention that collegial, independent bodies are unable to formulate policy, are not sufficiently accountable for their actions, and are poorly managed.

The Commission has been involved in extensive policy formulation, sometimes through cases in controversy, but more commonly through the development of general policy statements, rules, and regulations. A survey of Commission policy statements would not lead to the conclusion that the Commission's policies are generally narrow. The Commissioners have not avoided controversial issues. It is nevertheless true that a large amount of time and effort is required to formulate many of the anticipatory policies of wider applicability. The benefit of coequal Commissioner participation in policy formulation is that each decision reflects the judgment of a group comprising possibly divergent viewpoints, whose members are equally exposed to relevant material. This type of decision-making provides a check on arbitrary action, but, even more important, it is probably reflective of a cross section of public views.

Both the statutory provisions of the CPSA and its implementation by the Commission refute the Ash Council's conclusion that an independent collegial body cannot be sufficiently accountable. The Commission is accountable to the public, although the vehicles for checking its actions are with the legislative, executive, and judicial branches of government. The statutory vehicles for accountability are: Appointment of a bipartisan Commission by the President with the advice and consent of the Senate; ability of the President to remove the Chairman or Commissioners for malfeasance in office or neglect of duty; oversight functions of Congress; concurrent submission of budget requests and justifications to the President and Congress; and judicial review of Commission activities. The additional means created by the Commission to facilitate the accountability of the Commission to the public are part of an "openness" policy. Thus, CPSC policy requires that in most instances Commission meetings be open to the public. A liberal Freedom of Information policy allows the fullest possible disclosure of information to any person who requests it, without unjustifiable expense or delay. In addition, all Commissioners' votes and decisions are published. Finally, the CPSC has a policy of encouraging the public participation in its activities.

The Ash Council concentrated on the wrong object of regulatory agencies' accountability. What is important is that agencies be accountable to the public, using the executive and legislative branches as two of the many checkpoints. Accountability on many levels is woven into the fabric of the Act. Further, the Commission as a matter of policy has chosen not to insulate itself from the public.

Collegial bodies composed of highly competent individuals can be well-managed. The CPSA, designed in recognition of the need for strong centralized leadership, gave comprehensive and important managerial powers to the Chairman. In many ways the Chairman of the Commission, with job tenure, has greater freedom to act than the Ash Council's single administrator. In addition, the CPSC's experiences have contradicted the Ash Council's finding that collegial agencies are unable to coordinate their actions with other interested bodies. The Commission has established formal liaison with over 15 federal agencies, which has resulted in a sharing of information and a reduction of duplicated effort.

In establishing the Commission, Congress apparently believed that single administrator agencies are not necessarily managed effectively. The overwhelming view of Congress, expressed through the legislative process in the creation of the Commission, was to agree only in part with the *Ash Report's* conclusions and to establish another collegial body with a strong Chairman. The true measure, however, of the effectiveness of an independent regulatory agency is not merely the extent to which it can formulate policy, be made accountable and be effectively managed, but rather the extent to which that agency fulfills its statutory mandate. The application of the *Ash Report's* criteria indicates only the existence or nonexistence of mechanisms adequate to fulfill an agency's mandate. It appears that the present structure of the CPSC contains the mechanisms necessary to enable it to fulfill its mandate of protecting the public from unreasonable risks of injury associated with consumer products.

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APPENDIX E

Enclosure to Commissioner Pittle's Statement

MEMORANDUM

CONSUMER PRODUCT SAFETY COMMISSION

DATE: May 30, 1975

TO : Commission

FROM: R. David Pittle

SUBJECT: Standards Development and Implementation of the Offeror Process

I have read Larry's excellent speech to the American Society for Quality Control and was particularly interested in his comments regarding the offeror process because they stimulate and reinforce several thoughts I have had with respect to this process.

Although I have yet to find a comprehensive history of the offeror process, I have had several conversations with persons involved in its development and also have done some reading about it. Based upon this meager research, I have concluded that the process is a rather bizarre hybrid resulting from the clash of two major and divergent philosophies.

One group of interests involved in developing the process felt that government should generally defer to industry in standards setting. They preferred that government take industry's voluntary standards and adopt them as mandatory, and held that in no case should government independently develop standards that industry could form on its own. In sharp contrast, the other group distrusted industry's previous efforts at self-regulation and felt that government should take a leading role in standards development. Unable to obtain government dominance for the process, this group felt that some mechanism for insuring consumer input and scrutiny should be incorporated into the procedure to insure that government not be "captured" by the industries regulated by it. The present offeror process contains elements traceable to the philosophy of each group.

While this capsule history is oversimplified, I offer it as a reminder that the offeror process was built upon compromise in Congress between interests in fundamental disagreement about how standards development ought to proceed. Since it is a patchwork solution to a bitter conflict, I am reluctant to consider it as sacrosanct.

I have become increasingly concerned about the effectiveness of the offeror process as mandated by Congress and as implemented by the Commission. I make no claim of originality

for these concerns but hope, by raising them, to stimulate discussion that will prove fruitful to our goal of mandating safe and sensible standards.

1. Front-End Analysis: I completely agree with Larry's suggestion that the Commission must analyze more thoroughly the hazards to be addressed in the standard and the relevant existing standards. Specifically, I do not believe our staff should necessarily propose a solution to the hazards identified by CPSC analysis -- but I do believe that their understanding of the problem to be addressed by the standard must be thorough and have substantial depth. This, of course, applies to epidemiology as well as engineering and biomedical sciences.

In my opinion, this will result in fewer "second-guesses" by the offeror. While I do not believe that we should prohibit an offeror from disagreeing with our analysis of a product hazard or with the need for a standard, we should insist that the offeror complete his or her analysis of the data within a specified time at the beginning of the development period and immediately notify us of any disagreement with our analysis. This would give us the opportunity to judge whether or not we wished to terminate the offeror's participation for failing to make satisfactory progress in the development of the standard or to withdraw that aspect of the finding of need.

I realize that increased analysis by our staff will be more costly. I, as one Commissioner, gladly support increased funding and time allotment for our staff to do the necessary front-end analysis. Specifically this means we need to alter our FY '76 budget to provide for a substantial shift of funds to front-end analysis. The present FY '76 document indicates a decrease from FY '75 in this regard.

2. Role of Commission Monitor: I am extremely pleased that we have adopted an informal policy of frequent briefings by our monitors. This should keep us constantly up to date and permit us to provide helpful feedback to the offeror. Although I have not come to any final conclusion as to the exact degree of guidance the Commission should provide to the offeror through our monitoring, I am convinced that we should, at a minimum, explicitly and immediately indicate our concern whenever the offeror undertakes a course of action that we find unacceptable, such as adoption of part of a voluntary standard previously found inadequate by CPSC (which in turn requires that our initial finding stem from substantial research).

3. Time Period for Standards Development: Several aspects of the time period for the development of safety standards bother me. The CPSA provisions are premised upon the notion that safety standards for products should be drafted as expeditiously as possible. One might argue that the offeror process is a good mechanism for promoting rapid standards development since it provides for a concentrated and intensive group effort. It seems to me, however, that there are delays inherent in the offeror process that are unaccounted for and ought to be considered in evaluating the length of the development process. First, there is a period between the time the Commission decides to issue a Section 7 notice inviting offerors and the time the notice is actually published in the Federal Register. This "pre-notice" period is subject to no time constraints and may run quite long. The period may run even longer in the future if the Commission decides to do more front-end analysis prior to publishing a Federal Register notice. Second, the offeror, or at least a significant number of members on the offeror team, requires "start-up" time in order to become familiar with the current thinking of the Commission regarding the work to be done on the standard. Third, the 150-day time constraint seems to be unduly short to permit other than a hurried rewrite of voluntary standards. Fourth, when an offeror gives the Commission an inadequate or incomplete standard, the Commission must spend additional time in development or refinement of the proposed standard to the point where it can be proposed as a mandatory standard.

4. Offerors: One of the most innovative features of the offeror process, in my opinion, is the fact that Congress called for offerors, not solely from industry groups, but also from consumer and other independent groups. I think the fresh point of view from nonindustry groups is critical in the development of standards because they generally are free from any association with voluntary standards and feel no undue compulsion to adopt features from such standards where more desirable features are obvious. In addition, for industry groups that are accepted as offerors, these groups provide helpful competition to motivate the industry groups to pay particular attention to public participation requirements in order to gain acceptance of their offer.

With this background in mind, I am particularly concerned about our usual expectation that offerors finance most of the activities associated with the development of proposed standards with their own funds. Over the long run, I fear, such an approach would effectively freeze out all but industry groups with easily accessible resources for standards development. Although I am encouraged by the fact that ASTM (with the National Consumers League) and Consumers Union have

become offerors, I am fearful that groups able to expend funds in the process are too few in number and will be unable to continue their involvement without substantially increased funding from the Commission. If we did not or could not support this effort, I, for one, would have to conclude that the offeror process was not living up to its potential and should be thoroughly reexamined to see if it still served a useful function.

5. Office of Offeror Assistance: I believe we should actively assist potential offerors to an extent greater than we have done so far. Specifically, an Office of Offeror Assistance should be established to both stimulate and train offerors on the basics, as well as the subtleties, of the process. For example, I believe that with greater front-end knowledge provided by an Office of Offeror Assistance, George Washington University could have been a viable candidate to develop a television standard.

Furthermore, offeror seminars could be conducted through such an office as well as the distribution to potential offerors of information concerning format, testing facilities, participants, management skills and other important matters associated with the offeror process.

6. Evaluation Process: At the present time, our staff engages in a two-step evaluation process in which the standard developed by the offeror is first analyzed to determine whether or not it is responsive to the safety problem in question and then to determine whether or not the standard is technically adequate. If the first step contributes to any additional delay, I would prefer to abolish the first step in the evaluation process or to streamline it considerably. To my mind, the problem is that it is, in general, conceptually difficult to separate nonresponsiveness from lack of technical adequacy. The staff, consequently, may end up with a great deal of overlap in the two stages of evaluation. I suggest that the need for an evaluation for responsiveness is now somewhat moot, given the fact that the CPSC monitor will be briefing the Commissioners on a regular basis. We should now know very early whether or not the offeror is being responsive. Consequently, I would hope that we would instruct the staff to simply do one overall evaluation of the proposed standard.

7. Alternative Approaches to Standards Development: I do not pretend to know whether an approach markedly different from the offeror process would be significantly better. I do think it would be extremely useful to consider alternatives that combine some of the outstanding features of the offeror

process with those of CPSC internal development. Specifically, I would suggest that, under FFA and FHSA, we provide for substantially increased public participation in standards development while maintaining control and direction of the process. One possible approach would be to publish a Federal Register notice inviting interested members of the public to assist us in developing a standard, perhaps on upholstered furniture should we conclude a standard was warranted. The CPSC could manage the development of the standard and resolve all disputes arising during the process. In addition, we could impose fairly fixed time schedules for the development period. However, we would have the advantage of significant public participation. Were such a procedure successful, we might ask Congress to change the CPSA to correspond to this procedure. It is certainly worth a try.

UNITED STATES GOVERNMENT

Memorandum

U.S. CONSUMER PRODUCT SAFETY COMMISSION
WASHINGTON, D.C. 20207

TO Commission

DATE December 10, 1975

FROM R. David Pittle RDP

SUBJECT Section 30(d) Policy Statement Regarding Use of CPSA versus Transferred Acts

The Chairman's request to discuss a policy statement for Section 30(d) prompts me to set forth some of my thoughts on this subject for your consideration.

I do not, at this time, have major concerns with respect to Section 30(d) and the Flammable Fabrics Act (FFA), or the Poison Prevention Packaging Act (PPPA). Consequently, I shall leave to the Chairman the task of raising any issues regarding 30(d) and these Acts.

I do have a number of concerns, however, with respect to Section 30(d) and the Federal Hazardous Substances Act (FHSA). Specifically, I am troubled by the apparent trend the Commission is following in making 30(d) determinations in favor of administrative hearings under Section 15 of the CPSA at the expense of the FHSA Child Protection and Toy Safety Act procedures.

First, preliminary to any 30(d) considerations, I do not believe that the Commission has focused on the proper criteria for deciding jurisdiction under the FHSA Child Protection and Toy Safety Act. This is of fundamental importance because we cannot know whether a 30(d) determination is necessary until we know that a product falls under the jurisdiction of the FHSA.

I believe that the lack of proper jurisdictional criteria for the FHSA results in decisions to utilize the CPSA which rest on a very cloudy legal basis. In its brief life, the Commission, in my opinion, has produced a very inconsistent set of decisions with respect to products such as swimming pool slides, model train equipment, bicycles, aluminized kites, and aluminum baseball bats. Some products are regulated under the FHSA, some under the CPSA, and some have been the subject of 30(d) determinations. No clear legal principle or set of principles is evident. This inconsistency and consequent lack of predictability seem very unfair both to the industries we regulate and to consumers. I believe the solution to this problem is for the Commission to propose and publish an interpretative

rule for determining jurisdiction under the FHSA Child Protection and Toy Safety Act. (I have included a proposed rule as an Appendix to this memorandum.)

Second, the 30(d) determinations which the Commission has made to date seem to me, in certain instances, to be of dubious legality. In particular, I am concerned about 30(d) determinations to use the CPSA rather than the FHSA because public notice under the FHSA is "potentially" less effective than public notice under the CPSA. This is an incorrect approach. Section 30(d) does not direct the Commission to do a section-by-section comparison of the remedial powers of the CPSA and the FHSA. The claim that one section of the CPSA is potentially stronger than an analogous section of the FHSA does not, per se, justify complete reliance on this Act and the total abandonment of the FHSA. Only if all of the remedial powers of the FHSA, taken as a whole, could not eliminate or sufficiently reduce a risk of injury would such action be permissible under the CPSA. The FHSA authority to administratively ban products coupled with the Act's repurchase requirements is sufficient to deal with risks of injuries associated with almost every product falling under the jurisdiction of the Child Protection and Toy Safety Act. In fact, in most cases, the FHSA is more effective and efficient than the time-consuming adjudicatory procedures of the CPSA.

Furthermore, a Section 30(d) determination, while perhaps ultimately a legal decision, cannot be made without certain findings of fact. The Commission cannot, in my opinion, justify its decision to use the CPSA on the basis of its suspicion that public notice under the FHSA is potentially less effective than it would be under the CPSA. Rather, as I read Section 30(d), the Commission is probably required to set forth the reasons upon which it bases its conclusion that FHSA public notice is less effective than CPSA public notice and is certainly required to set forth the facts upon which it bases its conclusion that this lesser public notice authority results in an inability to eliminate or sufficiently reduce risks of injury under the FHSA.

The net result of the Commission's 30(d) determinations based on the relative potential for public notice of the two acts is to emasculate, not only the FHSA, but also, other transferred acts. If a 30(d) determination is necessary because the CPSA has greater public notice provisions than the FHSA, it can be used to justify abandoning the FHSA Child Protection and Toy Safety Act in

every instance. Further, I can see no reason why the Commission, if it were to be consistent, would not adopt the same approach with respect to adjudications under the Flammable Fabrics Act, which contains no greater public notice authority than the FHSA.

Third, aside from the problems of legality, I feel it is unsound policy to abandon the FHSA Child Protection and Toy Safety Act in favor of Section 15 adjudications under the CPSA. I believe that Congress intended to confer the greater powers found in this Act in order to provide an extra measure of protection to the public where the safety of those least able to protect themselves -- children -- is concerned. Contrary to what one might assume, this greater protection is not achieved at the cost of "due process" to industry. No banning action under the FHSA (save for imminent hazard situations -- which the Commission has never attempted under the Child Protection and Toy Safety Act) may be taken without the "due process" requirements of notice and an opportunity for comment being provided to a producer of an allegedly unsafe article. In the event that one believes that companies should be provided an opportunity for a hearing, it is possible to do so under the FHSA. In fact, there is precedent for this approach. For example, on March 20, 1974 the Commission held such a hearing to investigate the hazards of plastic balloon toys.

In short, I would be completely reluctant to adopt any policy with respect to Section 30(d) that results in abandonment of the FHSA Child Protection and Toy Safety Act.

Attachment

APPENDIX

After careful review of the court and Commission decisions with respect to jurisdiction under the FHSA Child Protection and Toy Safety Act (for a full discussion see my opinion on the bat and kite decisions), I have concluded that the most legally supportable (and wisest) rule is one that measures whether or not a product is a "toy or other article intended for use by children" by the objective intent of a producer that children use his or her product. By objective intent, I mean that intent which can reasonably be attributed to a person based on an observation of the person's expressions and actions. This is consistent with traditional decisions on intent which require one to be judged on the basis of one's objective, expressed and not secret, personal, intentions. United States v. 681 Cases, More or Less, Containing "Kitchen Klenzer", 63F. Supp. 286, 287 (E.D. Mo. 1945). See also, Industrial Products Mfg. v. Jewett Lumber Co., 185 F. 2d 866 (8th Cir. 1951).

I would suggest the following rule: Any article used for sports or for the amusement of children (including young teenagers) or any article such as a game, doll, stuffed animal, or other toys; swings, slides, seesaws, and other playground equipment, sleds, toboggans, bicycles, tricycles, and other recreational equipment; infants' carriages and strollers; slatted, netted, or lidded cribs and other nursery equipment; children's furniture, science and construction kits; children's footwear; and sports equipment; or items similar to these shall generally be considered toys or other articles intended for use by children and regulated under the FHSA, especially if:

i) the article is advertised or promoted in a manner designed to appeal to children or to adults to purchase for use by children, or

ii) the article is packaged in a manner designed to appeal to children or to adults to purchase for use by children, or

iii) the article is sold in toy stores or toy departments of stores, or

iv) the article does not contain a clear and conspicuous statement declaring that it is for adults only nor instructions warning against use by children.

While one can imagine situations in which the Commission would want to regulate a company under the FHSA even though it labeled its product "for adults only," I believe these situations would be rare.

I believe a rule such as I have proposed is helpful because it allows the producer or distributor of an article which is arguably suitable both for adults and children to decide whether or not to market it for children and thus be regulated under the FHSA. If they have one model of a line which they do not feel is appropriate for use by children, then they may label the product accordingly and avoid much of the uncertainty as to which act the article is regulated under. Companies not labeling their products would not be in a particularly strong position to challenge FHSA jurisdiciton over their products. Furthermore, purchasers and users will then have proper warning about the age groups which should be wary about using products not intended or safe for children to use.

CONSUMER PRODUCT SAFETY COMMISSION

OF THE

UNITED STATES OF AMERICA

Appeal From the Denial Of)
A Freedom Of Information)
Act Request For Two Legal)
Memoranda Concerning The)
Issuance Of An Order Re-)
Quiring Access Served On)
Berven Carpet Mills, Inc.)

DISSENTING OPINION OF
COMMISSIONER R. DAVID PITTLE

PITTLE, COMMISSIONER: This matter involves a relatively narrow -- albeit important -- issue. Where the CPSC previously, as a matter of discretion, provided an investigatory file, including memoranda which explored possible legal strategies, to counsel for a company under investigation pursuant to counsel's Freedom of Information Act[1/] (FOIA) request, should the CPSC thereafter refuse to release the file when other members of the public request the same file?

On November 20, 1975, the Commission addressed an appeal by Richard Gimer, counsel for Berven Carpet Mills, Inc., (hereafter, Berven) from a partial denial by the Office of the Secretary of his FOIA request for copies of all documents which formed the basis for the Commission's issuance of an

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1/ 5 U.S.C. §552 et. seq.

Order Requiring Access served on Berven on September 4, 1975. Although the Secretary had provided Berven's counsel with copies of establishment inspection reports, sample collection reports, affidavits, and production data, counsel sought, in addition, two staff memoranda advising the Commission about the various legal strategies available to it in its investigation of Berven.

In his appeal, counsel argued that the CPSC's issuance of an Access Order in this matter constituted a sharp departure from past enforcement procedures and therefore required careful examination by the public

> The issue here is far-reaching. One District Court action has already been initiated as a result of a similar process seeking similar information. Consumer Product Safety Commission v O.N. Jonas Company, Inc., C.A. No. C75-114R, N.D. Ga.2/ Unless there is a policy change by the Commission, numerous other such actions may be necessary. The time is propitious for public scrutiny of the advice the Commission is receiving from its staff on this subject. (Letter from Richard Gimer to Richard Simpson, October 23, 1975) (Emphasis added).

Although the Commission concluded that the memoranda sought by Berven's counsel were clearly within the exemption provisions of the FOIA, respectively as "intra-agency memoranda"3/

2/ On December 23, 1975, the Federal District Court ordered the O.N. Jonas Company to permit the CPSC to inspect the documents sought. Contrary to Mr. Gimer's claim, the courts support broad authority of the Commission to order access to a company's records.

3/ 5 U.S.C. §552 (b)(5)

and as "investigatory files compiled for law enforcement purposes,"[4] it nevertheless, by a 3-2 vote, decided, as a matter of discretion, to release the memoranda. I dissented. While I believed that any and all factual information that formed the basis for the Commission's decision to permit CPSC staff to seek an access order should be released, I did not believe that Mr. Gimer demonstrated any compelling reason for disregarding the law's protection for the confidentiality of staff legal advice.[5]. In addition, I believed that positive harm would result from the release of these memoranda. As the Congress, in providing these exemptions, and the courts, in repeatedly upholding them, have stated, frank discussion of legal and policy matters may well be severely inhibited if the discussion is made public. The result is that agency decisions decline in fairness and quality. See, e.g., S. Rep. No. 813, 9; H.R. Rep. No. 1497, 10; N.L.R.B. v Sears, Roebuck & Co., ___ U.S. ___, 95 S. Ct.1504, 1516 (1975); EPA v Mink 410 U.S. 73 (1973); Ackerly v Ley, 420 F. 2d 1336 (D.C. Cir., 1969).

4/ 5 U.S.C. §552(b)(7).

5/ The CPSC "Enforcement Policy for the Flammable Fabrics Act," (16 C.F.R. §1602.1; 40 Fed. Reg. 59885; Dec. 30, 1975) sets forth far more thoroughly the distinction between the former FTC enforcement policy and the present CPSC approach than do the legal memoranda sought by Mr. Gimer. Among other things, the policy states the CPSC "hereby institutes an enforcement policy of using in each case arising under the Flammable Fabrics Act any and all appropriate procedures available under that act." (Emphasis added) It further states that any conflicting determinations and policies of the FTC "insofar as they apply to this Commission are terminated and set aside pursuant to section 30(e)(2) of the Consumer Product Safety Act...(15 U.S.C. 2079(e)(2))."

Even if CPSC decisions were to be unaffected by the release of legal memoranda, I believe the memoranda inevitably will be unfairly exploited by litigants challenging CPSC regulations. Good legal advice necessarily includes a full discussion of the weaknesses as well as the strengths of a proposed course of action. Aside from the unfairness of Government providing free legal advice to adverse litigants, the release of legal memoranda gives an unwarranted "seal of approval" to arguments based upon staff discussion of the weaknesses of the Government's case. Thus, where the agency pursues a policy contrary to one recommended by its legal staff, the courts, in my opinion, will not evaluate the new policy on its merits but will be unfairly skeptical about it simply because it differs from the staff's recommendation.

Thus, in releasing these legal memoranda, I believe the Commission crossed the dividing line between "openness" and "nakedness." As Professor Page eloquently argues:

> ...release of legal memos may have a chilling, negative effect on the quality of legal advice the Commission is receiving. The relationship between the General Counsel's Office and the CPSC is one of lawyer and client. The General Counsel should feel free to offer the Commission advice on legal strategies and alternatives without having to worry about how his advice might later be used against the CPSC in litigation or otherwise.
>
> Neither industry nor consumer groups have any compelling need to know about this advice. We support the release of all factual data the Commission receives

> or generates, but urge that it maintain the integrity of internal communications relating to legal opinions and strategies.
>
> By releasing its legal memos, the Commission confuses openness with nakedness. The public interest demands that this material be kept confidential.6/

Subsequent to the Commission's decision to release the legal memoranda to Berven's counsel, Sharon Coffin, Executive Editor of Product Safety Letter, filed an FOIA request for the same documents. On January 19, 1976, the Secretary denied the request on the basis of the sections of the FOIA which exempt from disclosure "investigatory records compiled for law enforcement purposes...to the extent that the production of such records would...deprive a person of a right to a fair trial or an impartial adjudication, [or] constitute an unwarranted invasion of personal privacy."7/

Somewhat suprisingly--at least to me--counsel for Berven joined with the Secretary in opposing the release of the legal memoranda. In sharp contrast to his earlier urging of "public scrutiny" of the Commission's legal advice, counsel, in a nine page letter marked "CONFIDENTIAL," strongly argued that release of the memoranda would have "devastating consequences extending well beyond the parties involved in the instant inquiry."

6/ Remarks by Professor Joseph Page and four students from the Lawyering in the Public Interest Seminar at the Georgetown University Law Center before the Subcommittee on Consumers of the Committee on Commerce, United States Senate, Hearing on S. 644 and S. 1000 (Consumer Product Safety Commission Improvement Act) p. 150 (February 26, 1976).

7/ 5 U.S.C. 552(b)(7)(B) and (C).

On March 11, 1976, the Commission, by a 3-1 vote, affirmed the Secretary's refusal to release the memoranda to Ms. Coffin. I dissent. I believe the net effect of the decision is the establishment of a policy of CPSC openness for industry but not for the general public.

In considering the merits of the Commission's decision, one must be aware that the provisions invoked by the Commission are part of the amendments to the FOIA enacted on November 21, 1974.[8/] Because they are new, one has little judicial interpretation of them for guidance. Nevertheless, I believe that the concepts they embody are not new and are reasonably clear.

(i) Deprivation of Right to Fair Trial or Adjudication: Section 552(b)(7)(B) permits the withholding of investigatory records to the extent that their release would "deprive a person of a right to a fair trial or an impartial adjudication." There is no specific explanation of the exemption in the legislative history. However, the thrust of the section seems clear. Congress was concerned that the disclosure of investigatory files could result in prejudicial publicity in advance of a criminal trial, or a civil case tried before a jury.

Although I strongly agree with the rationale behind this section, I do not believe it can be stretched to cover the instant situation. Each case of alleged prejudicial

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8/ P.L. 93-502. The amendments became effective February 19, 1975.

publicity must rest on its "special facts." United States v Barrett, 505 F.2d 1091 (7th Cir., 1975). Under the facts at hand, the possibility of adverse pre-trial publicity is extremely remote. The Commission documents have been sought by a Washington-based newsletter with a readership comprised mainly of corporate executives. The odds of any of Product Safety Letter's readers being called for jury duty in California are too small to calculate. Nor, in my judgment, are the memoranda of such newsworthiness that any publication of general circulation would be likely to devote an article to them.9/ However, to guard against even this remote occurrence, I believe a carefully worded disclaimer from the Commission indicating that the memoranda contain only allegations, not proven facts, and advice, not Commission policy, would place the memoranda in proper perspective.

Even if the worst were to occur and the memoranda were to be widely publicized with no attention paid to CPSC disclaimers, it is highly unlikely that a court would conclude that Berven or its employees were deprived of a fair

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9/ Some publicity has been generated by a lawsuit filed by Berven against the Consumer Product Safety Commission to enjoin the CPSC from enforcing its Order Requiring Access. "Firm Sues to 'Hide' Customers," The Fresno Bee. (February 12, 1976). Any notoriety resulting from this action cannot be held against the Government. In my opinion, the lawsuit substantially lessens any claim that Berven or its employees have that release of this material would invade their privacy. See pp. 12-13 of this opinion.

trial by virtue of adverse pre-trial publicity. The courts are extremely reluctant to dismiss or reverse cases on this ground. Only the most extreme cases where there is a "carnival atmosphere" resulting from relentless, unfair publicity have been adjudged violative of the rights of defendants. See, e.g., Sheppard v Maxwell, 384 U.S. 333 (1966) (months of day-to-day, pre-trial publicity adding up to five volumes of newspaper clippings including articles entitled "Why isn't Sam Sheppard in Jail?" "Quit stalling--Bring him in," held to violate Sixth Amendment and due process clause); Estes v Texas, 381 U.S. 532 (1965) (Defendant was deprived of his right under the Fourteenth Amendment to due process by the televising of his "notorious, heavily publicized and highly sensational criminal trial."). The reluctance of the courts stems from the fact that they have a number of legal tools to effectively protect a defendant's right to a fair trial including voir dire examination of jurors, change of venue and continuances. See, United States v Abbott Laboratories, 505 F. 2d 565 (4th Cir., 1974). These tools, if necessary, have been more than sufficient to protect the rights of defendents. See, United States v Tokoph, 514 F. 2d 597 (10th Cir., 1975) (change of venue unnecessary where four newspaper articles discussed criminal charges against defendant and another person -- who had pleaded guilty to the charges against him -- and one of the articles contained a photograph of the two together.); United States v Barrett, 505 F. 2d 1091 (7th Cir., 1975) (continuance of trial unnecessary where defendant was a

prominent political figure and was named in a number of articles detailing the charges against him); United States v Abbott Laboratories, 505 F. 2d 565 (4th Cir., 1974). (Where pretrial publicity attributable to the Government was prejudicial and highly inflammatory, dismissal of charges against defendants is too extreme a remedy since voir dire, change of venue, or continuance probably would be sufficient to counter the adverse publicity); and United States v Pfingst, 477 F.2d 177 (2d Cir., 1973) (reversal of conviction for bribery unwarranted where prosecution held a press conference announcing defendant's indictment "designed for dramatic effect and to call attention to the prosecutors rather than for public information and enlightenment about the administration of justice in Suffolk County.")

It has been suggested that a court would be particularly concerned about adverse publicity resulting from these memoranda because they are Government documents. I agree that Government has a special obligation to respect and protect the rights of persons. See generally, 28 C.F.R. §50.2, "Release of information by personnel of the Department of Justice relating to criminal and civil proceedings." However, as stated earlier, I do not agree that the release of these memoranda -- especially with appropriate disclaimers -- pursuant to a Freedom of Information request can be considered in any way improper on the part of this agency.

Furthermore, the test that the courts apply in determining whether or not prejudicial publicity is grounds for dismissal or reversal is the content of the adverse publicity not the source of it. In United States v Abbot Laboratories, supra, the court found that both the Food and Drug Administration and the Department of Justice had deliberately issued stories to the press linking a number of septicemia deaths to intravenous solutions produced by the defendents in a manner that could be expected to have a substantially adverse effect on the impartiality of prospective jurors. Nevertheless, the court ordered trial to be commenced.

> Of course in the instant case, the factor of governmental misconduct in initiating prejudicial pretrial publicity is greater than it was in Wansley [v Slayton, 487, F. 2d 90]; but this is a distinction, for present purposes, largely without a difference, since the outcome of the case, as we see it, depends upon whether fairness to defendants may still be accomplished and not whether misconduct of the government warrants punishment which also forfeits the rights of society. 505 F. 2d at 571 (Emphasis added).

As a final point, I think it is important to remember that the stated ground upon which counsel for Berven originally sought these memoranda was to permit "public scrutiny" of the basis upon which a Commission decision to seek an access order was reached. Whatever the merits of counsel's argument, it is hardly fair to the public to permit only one of its members to see the material. One should not overlook the fact that the public, which has a right to be protected from

flammable fabrics, possesses an interest in the outcome of Commission investigations as strong as Berven's.

(ii) Invasion of Privacy: The second ground for denial of Ms. Coffin's request cited by the Secretary is section 552(b)(7)(C) which permits the withholding of investigatory records to the extent that production of the records would "constitute an unwarranted invasion of personal privacy."

Except for the omission of the word "clearly" the language of this section is the same as that in section 552(b)(6)[10/] of the FOIA. Thus, in determining the meaning of section 552(b)(7)(C) it seem appropriate to refer to judicial interpretations of section 552(b)(6).

Cases under section 552(b)(6) make clear that privacy is a unique concept. Court interpretations of other sections of the FOIA do not permit an agency, when responding to a request for information under the act, to consider either the identify or the motives of the requester. N.L.R.B. v Sears, Roebuck & Co., ____ U.S. ____, 95 S. Ct. 1504 (1975); EPA v Mink, 410 U.S.73(1973); Benson v General Services Administration, 289 F. Supp. 590 (W.D. Wash. 1968). However, cases involving the section on invasion of privacy do. To determine whether or not release of material would invade a person's

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10/ This section exempts "personnel and medical files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

privacy, an agency must engage in a "balancing of interests between the protection of an individual's private affairs from unnecessary public scrutiny, and the preservation of the public's right to governmental information." S. Rep. 813 89th Cong., 1st Sess. at 9 (1965); Getman v National Labor Relations Board, 450 F. 2d 670, 674 (D.C. Cir., 1971). Implicit in the balancing test is a right for an agency to inquire into who seeks information and to what use the information will be put. Getman, supra, at 677.

Berven, as a corporation, cannot claim the protection of an exemption for privacy. Privacy is a right of individuals and not corporations. United States v Morton Salt Co., 338 U.S. 632 (1950); Clinton Community Hospital Corp. v Southern Maryland Medical Center, 374 F. Supp. 450 (D. Md.) (1974); U.S. Code, Cong. and Admin. News, 89th Cong., 2d Sess., 2428(1966). Of course, individuals within Berven undoubtedly are protected by the privacy exemption. The courts have suggested that protected matters -- such as the names of individuals -- be deleted from documents so that the remainder of the documents can be disclosed. Grumman v Renegotiation Board, 425 F. 2d 578 (D.C. Cir., 1970); Bristol-Myers v Federal Trade Commission, 424 F. 2d 935 (D.C. Cir., 1970). Furthermore, no confidential material should be left which would enable persons with knowledge of the area to determine the identity of the individuals involved. Rural Housing Alliance v United States Department

of Agriculture 498 F. 2d 73 (D.C. Cir., 1974).

A decision on proper deletions to protect the rights of Berven's employees is made extremely difficult in the instant situation because Berven has instituted a lawsuit against the Consumer Product Safety Commission to enjoin the Commission from enforcing an Order Requiring Access against Berven or any of its officers, agents or employees. Berven Carpets Corporation, et.al. v Consumer Product Safety Commission, et.al., C.A. No. F-76-33 (E.D. Cal., filed Feb. 9, 1976). Any matters alleged in Berven's Complaint are public and cannot be fairly deleted from the material which the Commission has been asked to release.11/ Because Berven has placed before the public the fact that its "officers, agents, or employees" are subject to an investigation by the Commission which may result in possible criminal charges, it would hardly seem to interfere with their right to privacy to release a Commission document which sets forth CPSC staff's thinking on this point. Of course, fairness would dictate that the names and positions of any of Berven's employees be deleted from the material. Beyond this, I do not believe that release

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11/ Counsel, in his letter to the Commission arguing for a denial of Ms. Coffin's FOIA request, insisted that release of certain proprietary information would cause competitive harm to Berven. Paradoxically, most of the information referred to by him is set forth in Berven's Complaint. For example, information concerning the number of Berven's customers for a style of carpet known as "Whispering Shadow" ("approximately 1,000" according to paragraph 47 of the Complaint) and the quantity of "Whispering Shadow" produced in various production periods ("From April 16, 1971 through September, 1974, Berven produced approximately 25,153

of these legal memoranda -- which provide few details other than those already set forth by Berven -- can be considered to invade any right of privacy which section 552(b)(7)(C) was intended to protect.

Moreover, even if the memoranda did contain material not disclosed by Berven, I believe that it is fundamentally unfair to provide the documents to Berven pursuant to a request under the Freedom of Information Act without providing, to the greatest extent possible, the same material to the rest of the public. Denying the public any access to this material would result in improper "balancing" in favor of Berven. The public has a right to be protected from unsafe products (Obviously, I have made no judgment at this point that Berven has produced any.) Should Berven be placed in an advantageous litigation position by obtaining these legal memoranda, the public's protection is diminshed. Citizen groups or concerned individuals may wish to intervene should the Commission decide to institute civil proceedings against Berven. Access to these memoranda would enable them to judge the Commission's legal strategy in the instant situation to the same extent as Berven.

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linear yards of 'Whispering Shadow' carpet" according to paragraph 11 of the Complaint) are detailed by Berven. It is difficult to take Berven's claim for confidentiality seriously given these disclosures in its own legal documents. Obviously, Berven could have sought in camera treatment for this information if release of the material would truly harm Berven.

Furthermore, should, arguendo, the Commission and Berven enter into a consent agreement for a cease-and-desist order, the public would have a right to submit comments on the terms of the agreement. Their ability to comment is prejudiced by the fact that only Berven has access to the Commission staff's proposed legal strategy.

Finally, one cannot avoid the appearance of impropriety in permitting the Freedom of Information Act to be used to benefit a company under investigation while excluding public access to the same information. This seems to undermine one of the basic principles of the FOIA. "The Act is fundamentally designed to inform the public about agency action and not to benefit private litigants." N.L.R.B. v Sears, Roebuck & Co., 95 S. Ct. 1504 at 1513. EPA v Mink, 410 U.S. 73 at 79.

CONCLUSION

Legal memoranda from CPSC staff provide invaluable guidance to the Commission. The free release of non-factual portions of these memoranda to the public severely diminishes the capacity of CPSC staff to provide candid and innovative advice. It also unfairly biases consideration of Commission decisions by the courts. One hopes that the Commission will not continue to release these documents through the mistaken assumption that the public's very appropriate insistence on openness dictates such release. Moreover, one hopes that if the Commission ever does release such material to a company, the Commission will make clear that the material will thereafter be

It was also surprising that toys produced this year and contemplated for next year are rather complex in function and consist of multiple parts, each part requiring its own mold. The complexity of these products could result in a substantial economic problem for toy companies if changes are required as a result of CPSC requirements.

Most of the toy bannings of CPSC have concerned imported products and it was intended to visit the international toy fair at the New York Coliseum. However, prior commitments for Tuesday, the last day of the international fair, prevented the writer from attending.

available to any other member of the public.

March 19, 1976

R. David Pittle (by RSA)
R. David Pittle, Ph.D.
Commissioner

APPENDIX F
[Enclosures to Commissioner Franklin's statement]

THE CONSUMER PRODUCT SAFETY COMMISSION
OF THE UNITED STATES OF AMERICA

In the Matter of a CPSC Recommendation for Criminal Prosecution for Certain Violations of the Federal Hazardous Substances Act and the Poison Prevention Packaging Act	BCMI No. 1862

CONCURRING OPINION OF
COMMISSIONER BARBARA HACKMAN FRANKLIN

In Executive Session on January 8, 1976, the Commission voted to recommend that the United States Attorney commence a criminal prosecution in the above-listed matter against a certain manufacturing company and two of its executive officers.*/ The facts show that the company, in manufacturing and distributing certain products, failed to utilize child-resistant packaging required under the Poison Prevention Packaging Act (PPPA) and failed to display proper cautionary labeling required under the Federal Hazardous Substances Act (FHSA). If prosecuted for these alleged misdemeanors, and convicted, the proposed defendants would be subject on each of the counts to a $500 fine, 90-day imprisonment, or both.

I concur in the Commission's decision to recommend prosecution in this case, and I hope that the Commission staff will refer the case immediately to the United States Attorney for a decision whether or not to prosecute.

In reviewing the staff briefing materials, however, I am concerned by the extensive, unexplained and apparently unnecessary delays in preparing this case for presentation to the Commissioners. Such delays make a clear-cut criminal violation less attractive for the United States Attorney to prosecute, thereby undercutting the Commission's efforts to enforce the laws entrusted to it.

This case was developed under a 1975 field delegation program which was initiated by the Bureau of Compliance to reduce the time span between the identification of a PPPA or FHSA violation and the appropriate regulatory action.

*/The proposed defendants are not identified in this opinion, in order to avoid a) possible undermining of the criminal proceeding and b) possible unfairness to the proposed defendants whose prosecution may yet be rejected by the United States Attorney.

Under the program, one of the Commission's area offices recommends the appropriate level of administrative and/or enforcement action and is responsible for preparing all documents to carry the case forward. The program includes four implementation phases, the first of which requires Bureau of Compliance review and concurrence before the case is forwarded to the Commissioners.

The following case chronology was presented to the Commission:

November 7, 1974 - A CPSC investigator inspected the proposed defendant's manufacturing plant as a follow-up to an earlier inspection during which violations had been detected. During this follow-up investigation, FHSA and PPPA violations were suspected and samples of the suspect products were obtained.

January 18, 1975 - A CPSC laboratory confirmed that the products were in violation of the FHSA and PPPA.

April 1, 1975 - The CPSC area office issued a notice of hearing under section 7 of the FHSA to two executive officers of the company. Section 7 provides that before any violation of the FHSA is reported by the Commission to the United States Attorney for institution of a criminal proceeding, the proposed defendant is to be given an opportunity to present his views, either orally or in writing, with regard to the contemplated criminal proceeding.

April 17, 1975 - The Section 7 hearing was held.

May 6, 1975 - The case was reviewed by the area office's Compliance Officer, and a two-count criminal information and accompanying case papers were prepared.

May 7, 1975 - The case was forwarded to the CPSC's Washington headquarters by means of a four-page memorandum from the area office. The memorandum contained detailed information regarding jurisdiction, case chronology, the individual defendants, and the violations involved. The memorandum was to be routed through the Bureau of Compliance for review.

November 10, 1975 - A one-page cover memorandum, prepared on an unspecified, but earlier date by the Bureau of Compliance, was approved by the Director of the Bureau and the Executive Director.

It reiterated some of the information in the area office's memorandum and indicated the Bureau's concurrence with the area office's recommendation.

December 31, 1975 - The Office of the Secretary forwarded the briefing materials on the case to the Commissioners. This was the first time they saw the case.

This case was initiated in late 1974. The area office apparently had all of the relevant facts wrapped up in a package by early May of last year, and the matter should have been before the Commission very shortly thereafter. The case should have been on the desk of the United States Attorney by June or July, 1975. Now 14 months old, this case has not advanced an inch in the last eight months.

Such extensive, unexplained and unnecessary delay by this agency in developing and forwarding its cases has frequently been a decisive factor for a United States Attorney in declining to prosecute CPSC cases. In declining a 1974 CPSC request to prosecute, a United States Attorney stated: "There is no satisfactory explanation for a delay of an entire year between the alleged offense, where timely prosecution might be a deterrent, and the arrival of the prosecution request." In a subsequent case, the same United States Attorney declined prosecution on the ground that "the acts complained of occurred quite a while ago, that is, there has been a delay since the events complained of . . . In light of this, we do not feel that prosecution is warranted or would be in the best interest of the government." More recently, another United States Attorney wrote, in declining to prosecute a 1975 CPSC case: "We have found, in our experience, that stale cases do not receive the type of consideration and penalty from the court that we would appreciate."

This case is not an isolated instance of internal delay on enforcement matters -- not even among those cases developed under the 1975 field delegation program. The time span between the identification and confirmation of violations and the appropriate regulatory action must be shortened. Hopefully, this will be accomplished during 1976 and cases ripe for prosecution will be forwarded, with all deliberate speed, to the Commissioners and then, if the Commissioners so decide, to the prosecutors.

Barbara H. Franklin

Barbara Hackman Franklin
Commissioner

January 27, 1976

THE CONSUMER PRODUCT SAFETY COMMISSION
OF THE UNITED STATES OF AMERICA

In the Matter of CHARLES CASTRO, an individual trading as BAY AREA MATTRESS COMPANY and KEVA MATTRESS COMPANY	)))))	Docket No. CPSC 75-2

DISSENTING OPINION OF
COMMISSIONER BARBARA H. FRANKLIN
REGARDING THE INITIATION OF
AN ADJUDICATIVE PROCEEDING AGAINST THE RESPONDENT

On March 11, 1975, a Notice of Enforcement was filed against the respondent (herein referred to as "Bay Area") for alleged violation of the Commission's mattress flammability standard, FF 4-72. This commencement of an adjudicative proceeding against Bay Area is the direct result of the Commission's decisions on December 5, 1974, and January 23, 1975 to reject a consent agreement (including a proposed order) negotiated by the Commission's staff with Bay Area. I dissent from both these decisions.

In my opinion, an adjudicative proceeding involving nothing more than a technical violation of FF 4-72 will probably not result in a significantly stronger order than that already negotiated with Bay Area. Moreover, I do not believe that the delay plus the expenditure of resources in an adjudicative proceeding are in the public interest in this particular case.

FACTS OF THE CASE AS STATED BY THE COMMISSION'S BUREAU OF COMPLIANCE

The Commission's staff alleges that Bay Area violated Section 3 of the Flammable Fabrics Act. This Section prohibits, among other

things, the manufacture for sale, the sale, or the offering for sale, in commerce, of any product which fails to conform to an applicable standard promulgated under the Act. In this case, the mattress flammability standard, FF 4-72, which became effective on June 22, 1973, applies. The standard includes requirements for flammability testing and related recordkeeping, as well as acceptance criteria to determine the actual flammability of mattresses. However, the standard allows the sale of a non-complying mattress for six months after the effective date if an attached label bears a required warning that the item does not comply with FF 4-72. Specifically, it is charged that Bay Area failed to conform to the standard in that during the six-month grace period the company sold about 600 mattresses without either conducting flammability tests prior to sale and maintaining the required records or, in lieu of the required tests, attaching a warning label. Of the 600 mattresses involved, 517 were produced for and sold to the County of Alameda, California, for use in its penal institutions. It is significant to note that a flammability test performed by the Commission's staff and six flammability tests subsequently conducted by an independent laboratory indicate that the 517 mattresses indeed met the flammability requirements of FF 4-72.

THE COMMISSION'S REJECTION OF THE SIGNED CONSENT AGREEMENT

During the course of negotiations between Bay Area and the Commission's staff, one major issue emerged: the nature and extent of Bay Area's refund or replacement upon the return of the mattresses

by its customers. Believing that Bay Area's approach to the subject of refund/replacement presented both a reasonable and prompt solution to the case, the Commission's staff signed the consent agreement and submitted it, along with a proposed order, to the Commission for approval. The consent agreement provided, among other things, that Bay Area would notify all of its customers that each of the 600 mattresses was required by the standard to have a warning indicating that it does not meet FF 4-72. Moreover, it provided

> "... that, with the exception of those 517 mattresses sold to the County of Alameda under purchase order numbers 83009, 85542, 79826, 81516, 84561 and conforming to State of California specifications No. 12-6-72, all such customers may return said mattresses to respondent for replacement plus an allowance for reasonable transportation costs (the means of transportation to be determined by respondent) or refund of the purchase price less a deduction of 1% of said purchase price per month for use, at respondent's option."

Because of the above language, the Commission rejected the consent agreement on December 5, 1974 and, once again, on January 23, 1975. On the latter date, the Commission decided to issue a Notice of Enforcement thereby placing the matter before an administrative law judge for formal adjudication.

THE CONSENT AGREEMENT SHOULD HAVE BEEN ACCEPTED BY THE COMMISSION

I dissent from the Commission's rejection of the consent agreement, both in December and again in January, for several reasons.

First, an adjudicative proceeding involving nothing more than the technical violation of FF 4-72, as in this case, probably will not result in a significantly stronger order than the one previously negotiated by the Commission's staff. I do not believe that complete refund or

replacement should be required for the 517 mattresses which were produced for and sold to Alameda County for use in the County's institutions. It is not alleged that these mattresses are flammable. To the contrary, all testing by the Commission's staff and by an independent laboratory on behalf of Bay Area indicates that these mattresses indeed meet the flammability requirements of FF 4-72. The only alleged violation of FF 4-72 in connection with the 517 mattresses stems from Bay Area's failure to test the mattresses before they were sold to the County, or to affix warning labels indicating that the mattresses do not meet FF 4-72. For the Commission now to seek to require complete refund or replacement of these 517 mattresses is, in my judgment, an act of unreasonable regulatory overkill.

Second, regarding the remaining 83 mattresses, it is my opinion that it is unreasonable for the Commission to insist upon a complete refund or replacement. Had this case arisen under the Consumer Product Safety Act, Section 15(d) (3) of that Act would provide (after a favorable ruling by an administrative law judge at the conclusion of a formal adjudicative proceeding) for a refund of the purchase price of each mattress, "less a reasonable allowance for use, if such product has been in the possession of a consumer for one year or more. . ." It appears from the record that all of the 83 mattresses have been in the hands of consumers for more than a year. The Commission's staff advised the Commission that the normal life expectancy of a mattress used for non-commercial purposes is 8 to 10 years. Thus, in the opinion of the Commission's staff, a reasonable allowance for use would be 1 percent per

month. This reasonable allowance was reflected in the consent agreement and the proposed order, but was rejected by the Commission.

Third, I do not believe that the delay inherent in an adjudicative proceeding is in the public interest in this case. The legal -- and probably the practical -- effect of the order included in a consent agreement is essentially the same as that of an order issued by an administrative law judge upon the conclusion of a formal adjudicative proceeding. Both would specify that any future violation of any standard or regulation under the Flammable Fabrics Act would constitute a violation of the order. Both would subject Bay Area to a $10,000 civil penalty for each violation of the order after it becomes final. The advantage of an order obtained by consent agreement is that it is immediately enforceable after it becomes final.

Had the Commission accepted the consent agreement on December 5, or even on January 23, it would already have an effective and enforceable order designed to protect the public. The course chosen by the Commission serves only to delay the issuance of a final order for months. Until a final order is issued,the customers of Bay Area will not receive the required warnings which they allegedly should have received at the point of purchase in 1973. In addition, the customers who may be entitled to a refund or replacement will not be advised of their rights until a final order is in effect. If, in fact, the 83 mattresses should prove to be flammable, the return of those mattresses should not be delayed for months. Clearly, in my judgment, delay in this case in no way serves the public interest.

Fourth, I do not believe that the expenses associated with an adjudicative proceeding enhance the public interest in any way in this case. A formal adjudicative proceeding, on any matter at issue, often results in considerable expenditure of time and money. The preparation and filing of pleadings, the appearance at prehearing conferences and at formal hearings for oral argument, the filing of appeals, etc., can consume a substantial amount of the Commission's scarce resources. Moreover, on March 24, 1975, Bay Area filed a motion for change of venue, requesting that the entire adjudicative proceeding be held in California. Although the matter is completely within the administrative law judge's discretion, it seems likely that he would rule favorably on the motion since Bay Area is a small company and its witnesses are located on the West Coast. A consideration of the potential expenditure of money and manpower inherent in the upcoming adjudicative proceeding serves to reinforce my view that this case should have been concluded in December or January by the Commission's acceptance of the consent agreement.

Fifth, there is a possibility that the Commission will not be quite so successful at the adjudicative proceeding -- that the administrative law judge may issue a ruling which is weaker than the agreement which the Commission refused to accept. A bird in the hand is worth two in the bush.

CONCLUSION

There is no indication that Bay Area is truly a "bad actor" which, in some way, has to be taught a lesson. There is no indication that a formal adjudicative proceeding against Bay Area will, in accordance with the Commission's "motivational compliance" strategy, serve to motivate compliance by other companies with the Commission's standards, rules and regulations. There is an indication that this case involves an alleged technical violation which would have been adequately and reasonably remedied by approval of the consent agreement.

Barbara H. Franklin

Barbara Hackman Franklin
Commissioner

March 26, 1975

APPENDIX G

Materials on the Consumer Product Safety Standard Development Process of Section 7 of the Consumer Product Safety Act

CONTRIBUTIONS TO OFFERORS

Obligations to Jan. 31, 1976

Fiscal year 1975 funds:	
Architectural glass (Consumer Safety Glazing Committee)	$29,655
Power lawnmowers (Consumers Union) (original obligation $156,910+$25,000 reserve)	166,608
Bookmatches (American Society for Testing & Materials)	24,600
Television receivers (Underwriters' Laboratories)	60,895
Swimming pool slides (National Swimming Pool Institute)	14,000
Subtotal	295,758
Fiscal year 1976 funds:	
Public playground equipment (National Recreation and Park Association)	91,620
Total—All years	387,378

Source: Consumer Product Safety Commission.

ESTIMATED MAN-HOURS AND COSTS

The following figures are estimates of the CPSC man-hours and funds expended for the development of four standards under the Consumer Product Safety Act from the publishing of a "Notice of Need" in the *Federal Register* to January 31, 1976. Related Hazard Identification, Hazard Strategy Analysis and Administration program man-hours and costs are not included.

	Estimated man-hours [1]	Estimated total cost [2]
Swimming pool slides	4,160	$152,000
Architectural glazing materials [3]	11,510	522,000
Power lawn equipment [3]	11,600	803,000
Matchbooks [3]	11,111	465,000

[1] These man-hour estimates reflect the efforts of a large number of the CPSC staff who have contributed a portion of their time to 1 or more of these standard development projects. It does not include the effort of the people not employed by CPSC.

[2] Total cost includes salary, operating expense, common cost (overhead), contract and offeror agument costs. This does not include cost absorbed by the offerors.

[3] These 3 projects are not complete as of Jan. 31, 1976.

Source: Consumer Product Safety Commission.

COMMISSION DECISION AND OPINIONS PERTAINING TO FUNDING IN PROCEEDING FOR DEVELOPMENT OF ARCHITECTUAL GLASS SAFETY STANDARD

CONSUMER PRODUCT SAFETY COMMISSION
WASHINGTON, D.C. 20207

CPSC EXECUTIVE SESSION
1750 K Street, NW.

July 22, 1974
9:30 am

Presiding: Chairman Simpson

Present : Commissioner Franklin
Commissioner Kushner

ITEM

Discussions with National Consumer League/American Society for Testing and Materials of their offer to develop a mandatory safety standard for architectural glass.

DECISION

Because of the inability to reach agreement with NCL/ASTM on the possible payment of salaries to certain consumer representatives serving on the standards committee, the Commission decides to terminate discussions. The Commission further decides to open discussions with the Consumer Safety Glazing Committee with respect to that group's offer to develop a mandatory safety standard for architectural glass.

COMMISSION VOTE

In favor of the decision:

Chairman Simpson* R. Simpson

Commissioner Franklin** B. Franklin

Commissioner Kushner* [illegible]

Against:

Commissioner Newman (by phone to Commissioner Kushner 7-22-74)* [illegible]

Commissioner Pittle (7-23-74)* R. David Pittle

OTHER OPTIONS CONSIDERED

Reject all offers and republish request for offers in the Federal Register.

* Opinion attached
** Opinion to follow

Submitted by: Commissioner Kushner
August 16, 1974

DISSENTING OPINION OF COMMISSIONER R. DAVID PITTLE
REGARDING THE BREAKING OFF OF NEGOTIATIONS WITH
NCL/ASTM ON ARCHITECTURAL GLASS

On Monday, July 22, 1974, this Commission voted to reject the offer of the National Consumer League (NCL)/American Society for Testing and Materials (ASTM) because of their insistence that the offer retain a provision guaranteeing funds to ensure the availability of competent consumer representatives in the standards writing process. The majority of the Commission rejected this provision and immediately terminated negotiations.

I cannot agree with either aspect of the majority decision. I believe that further negotiations would have been fruitful. I also believe that this Commission has an obligation to take whatever steps necessary to ensure representation of the consumer interest by competent technical and nontechnical persons.

As I understand the latest proposal of the NCL, they have agreed to modify their original offer by emphasizing that they would take all possible steps to use consumer volunteers in every aspect of the standards development process. NCL would agree to first seek competent consumer representatives who will serve on a purely voluntary basis in accordance with any terms set by the Commission to guarantee that such a search would be conducted on a good-faith basis. Only after exhausting all reasonable efforts to obtain a balanced and complete consumer team on a volunteer basis would NCL then seek to fill vacancies on the basis of compensation.

I believe the NCL/ASTM position is reasonable and forms a basis for further negotiations. It recognizes the commitment of this Commission to the concept of volunteer efforts in the standards process, yet provides a realistic assurance that technically competent professionals will help to represent the consumer's view.

The concept of technically competent consumer representatives is one that must be stressed. To my mind, the major strength of NCL/ASTM's offer is the presence of consumer input during the development of the consumer product safety standard. One major factor working against the consumer interest in past government and voluntary standards development has been the lack of independent, technical consumer input. This stems from the fact that technically competent professionals, however public spirited, usually cannot afford to devote a substantial number of work days totally without salary in as short a time frame as several months. Furthermore, it is obvious that a consumer representative faced with a substantial loss of personal income may be unable or reluctant to participate. I believe that it would be patently unfair to burden consumer representatives with such sacrifices. Therefore, in the event that extensive efforts fail to obtain on a volunteer basis the needed balance on the consumer team, I would not foreclose the possibility of providing funds to acquire the necessary expertise.

In stating my position on this matter, I do not intend my remarks to be interpreted as indicating that I believe standards cannot be developed on a volunteer basis. On the contrary, I have a strong faith in the concept of using volunteer effort in standards development. The Commission has compiled a list of several hundred persons many of whom are technically proficient and willing to serve without compensation. Other sources of technically proficient persons may also exist and should be thoroughly explored. However, we must remember that one of the main tasks of this Commission is to write technically sound, adequate standards for the protection of the public. We cannot achieve this goal without strong expert consumer representation in the standards writing process and I would not sacrifice this representation for the sake of the principle of voluntarism.

I would resume negotiations with NCL/ASTM on the basis of an understanding that:

a) All reasonable efforts be made to secure competent technical and nontechnical volunteer consumer representatives.

b) Only after a determination by the Commission that all reasonable avenues to secure such representatives had been exhausted would the Commission consider alternatives such as paying a fee to secure the services of those persons.

July 26, 1974

R. David Pittle

R. David Pittle, Ph.D.
Commissioner

JUL 2 9 1974

SELECTION OF OFFEROR FOR THE DEVELOPMENT
OF A STANDARD FOR ARCHITECTURAL GLASS

DISSENTING OPINION OF COMMISSIONER CONSTANCE NEWMAN

I dissent from the majority in its decision to discontinue negotiations with NCL/ASTM.

The NCL/ASTM offer represented the best offer to develop the mandatory standard for architectural glass. Among the strong features of the offer were:

1. An understanding of the problems associated with the development of a standard for architectural glass as indicated in the issue identification section of the offer.

2. An understanding of the management skills required to develop an effective standard.

3. An understanding of and provision for the participation of interested parties - consumers and industry alike.

The latter feature is central to the development of a meaningful standard. Meaningful participation by the industry affected and by consumers must be assured. Consumers must be represented in various ways in the process among which would be by persons with training equaled to that of the persons representing the industry. This was the premise of the NCL/ASTM offer with which I am in agreement. NCL/ASTM showed an understanding of the

importance of this promise which was not present in the other offers.

I disagree with the assumption of NCL/ASTM in the original offer that meaningful consumer representation will not/can not be provided by volunteers when travel and per diem are paid. I am not prepared to adopt the position that there are no innovative approaches to schedule arrangement, to use of conference calls, to use of briefing papers and so forth which would accomplish the basic goal of meaningful consumer/industry participation. It would be poor public policy for the Commission to assume that volunteers do not exist when a number of major volunteer programs prove the contrary.

In my view, the Commission's offer in the negotiations should have been:
The Commission would agree to accept their offer with the proviso that there would be no money allocated for the payment of salaries for consumer or industry representatives. Further, the Commission would agree if after a reasonable period of time NCL/ASTM could prove that meaningful participation was not possible then the Commission would be available to explore all options to insure such participation.

I dissent from the majority opinion because I do not feel that the issue of payment of salaries was central to the offer. What was central to the offer was the issue of guaranteeing participation of lay and "technical" consumers. I feel that more is lost than gained by forcing a confrontation on the issue of payment of salaries since both the proposed offeror and the Commission agree that we are interested in insuring maximum participation of interested parties. I think that through the negotiation process the Commission's position was made clear. I think that through experience the Commission's position on the availability of volunteers would have proven correct. Therefore a forcing of the issue was not necessary.

My dissent from the majority I suppose is more fundamental and controversial than is indicated by the discussion above. I feel strongly that public officials have an obligation to recognize inequities in systems and where not violative of the specific legislative mandate should use their power to make those unequal systems more equal. Unequal systems will not be made equal if efforts of previous nonparticipants in the system are not accepted with patience and reasonable flexibility. Therefore I hope that the selection of the first offeror by CPSC will not be a signal to any segment

of the population that our policy of insuring participation of a wide variety of groups and individuals into a somewhat unequal system is merely rhetoric.

As a public official I would have gone an "extra mile" in the negotiations with NCL to insure that what we want to accomplish, i.e., the development of effective standards through meaningful participation of affected parties would be a reality as evidenced by the Commission's selection of the first offeror.

Constance B. Newman
Commissioner, CPSC
July 29, 1974

MEMORANDUM

DATE: August 2, 1974

TO : Sadye Dunn, Secretary

FROM: Richard O. Simpson, Chairman Richard O. Simpson

SUBJECT: Termination of Negotiations with NCL/ASTM as an Offeror to Develop a Safety Standard for Architectural Glass

I concur with the opinion of Commissioner Lawrence M. Kushner in this matter.

cc: Commissioners
Executive Director
S. Dunn
M. Brown
R. Eisenberg
B. Ludden

CONSUMER PRODUCT SAFETY COMMISSION
WASHINGTON, D.C. 20207

RECEIVED
OFFICE OF THE SECRETARY
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CONSUMER PRODUCT
SAFETY COMMISSION

OPINION OF

COMMISSIONER LAWRENCE M. KUSHNER

ON TERMINATION OF NEGOTIATIONS

WITH NCL/ASTM AS AN OFFEROR TO

DEVELOP A SAFETY STANDARD FOR

ARCHITECTURAL GLASS

It is with great reluctance and disapointment that I have cast my vote to terminate negotiations with the National Consumer League/ American Society for Testing & Materials as an offeror to develop a standard for arcnitectural glass under the Commission's Sec. 7 Rules. This Commission has unanimously and enthusiastically endorsed the desirability of full and effective participation by individual consumers and consumer groups in the development of standards. The Sec. 7 rules, themselves, reflect this conviction.

Failure to reach an acceptable agreement with NCL/ASTM is particularly bitter because of 1) the debilitating effect it may have on the interest of consumer groups to become offerors in response to subsequent Sec. 7 announcements and 2) the potential the decision has to encourage a cynical view by the public of the Commission's intentions regarding full consumer participation.

The fundamental issue that could not be resolved in negotiations with the NCL/ASTM was that of payment to any or all of the proposed 14 member consumer team in excess of actual expenses that they may incur as participants in the development of the standard. The NCL/ ASTM negotiating position was for explicit recognition by the CPSC that such payment could be offered as a last resort if technically qualified consumer representatives could not otherwise be obtained. In my view, the majority decision reflects the intent of the Commission in drafting the Sec. 7 rules not to provide salary for consumer or any participant on the standards development committee. I see no need to reexamine this policy at this time.

I acknowledge the fact that industry participants and representatives of other groups on the standards development committee will normally be on the committee as part of their duties of employment and therefore receiving compensation in the form of salary. However, I do not believe that this need result in inferior representation of the consumer's interest on the committee if consumer representatives are not on salary provided by Commission funds under the terms of the offer.

It is my conviction that qualified consumer participants can be obtained without payment in excess of expenses. This contention has been supported by a telephone survey of a sample of persons on the roster of volunteer consumer representatives compiled by the Commission as a result of its recent public solicitation. It should be noted that the majority of those called and willing to participate without payment in excess of expenses had professional training and were willing to commit to a schedule approximating that proposed in the NCL/ASTM offer--about 20 days over a 3 to 4 month period.

Departure from the Commission's present policy should only be considered after a convincing demonstration of its unsuitability and after thorough consideration of alternate policies. Such departure should certainly not be provided for automatically in an agreement with an offeror in the very first standards development undertaken under the Commission's Section 7 Rules.

This position is not to be interpreted as precluding funds to offerors to provide the benefit of expert technical support to the full committee responsible for developing the standard.

Commissioner Lawrence M. Kushner
August 1, 1974

THE CONSUMER PRODUCT SAFETY COMMISSION
OF THE UNITED STATES OF AMERICA

OPINION OF COMMISSIONER BARBARA H. FRANKLIN ON THE SELECTION OF AN OFFEROR TO DEVELOP A SAFETY STANDARD FOR ARCHITECTURAL GLASS

In Executive Session on August 6, 1974, the Commission voted to accept the offer of the Consumer Safety Glazing Committee (CSGC) to develop a proposed safety standard for architectural glass. The terms of the agreement are set forth in a document entitled "Acceptance of an Offer to Develop a Consumer Product Safety Standard Applicable to Architectural Glass," dated August 15, 1974 and signed by the Chairman of the Commission and the Chairman of the CSGC. A proposed standard is now being developed under the management of CSGC.

Prior to acceptance of the CSGC offer, the Commission terminated negotiations with its original first-choice offeror, National Consumers League/American Society for Testing and Materials (NCL/ASTM). This episode brought into focus the question of whether "salaries" should be paid in order to assure adequate consumer representation in the standards development process.

Now that the offeror has been selected and the development process is underway, I want to describe what happened in this case and highlight the issues which were raised.

I. BACKGROUND

Section 7 of the Consumer Product Safety Act provides a unique approach to the setting of mandatory safety standards. As I understand the intent of the law, this section places the burden for actual development of a standard upon parties outside the Commission. The Commission then has the authority to make a final decision whether to propose for adoption, and to adopt, a standard which has been developed in this manner. (However, under certain circumstances, the Commission may develop standards on its own.) Section 7 establishes, among other things, procedures whereby interested persons ("offerors") are permitted to offer to develop a proposed safety standard for a given product. This "offeror" procedure is initiated after the Commission makes a preliminary determination that hazards associated with a product present unreasonable risks of injury, and that a safety standard is necessary to reduce or eliminate those unreasonable risks.

Section 7 further provides that, if an outside party's offer is accepted, the Commission may, under Section 7(d)(2), agree to contribute to the offeror's cost in developing a proposed standard

> "....in any case in which the Commission determines that such contribution is likely to result in a more satisfactory standard than would be developed without such contribution, and that the offeror is financially responsible. Regulations of the Commission shall set forth the items of cost in which it may participate, and shall exclude any contribution to the acquisition of land or buildings." (Emphasis added.)

Under Section 7(d)(3), the Commission is directed to prescribe regulations governing the development of proposed consumer product safety standards. Because of the newness and importance of the offeror

process, the Commission considered draft after draft of these implementing regulations, subjecting them to intense public scrutiny prior to adoption. In the Federal Register of May 7, 1974 (39 FR 16202), the Commission published its final offeror regulations. Included in those regulations was the Section 7(d)(2) requirement specifying the items of cost for which the Commission might contribute toward the development of proposed standards, as well as the items of cost for which the Commission would not contribute. Sections 1105.9(f) and (g)(2) of the regulations are directly relevant to the issue of the payment of "salaries" for consumer representatives:

> "(f) The items of cost toward which the Commission may contribute are those allowable direct and indirect costs allocable to the development project (as set forth in the applicable subparts of Part 1-15 of the Federal Procurement Regulations (41 CFR Part 1-15). The Commission may contribute to the costs of assuring adequate consumer participation in the development of the standard." (Emphasis added.)
>
> "(g) The items of cost toward which the Commission will not contribute include:
>
> ****
>
> (2) Costs for the payment of salaries in excess of the salaries paid by the offeror to individuals at the time immediately preceding the offer, except for longevity and other routine increases which may accrue during the development of the standard;"

The architectural glass case has special significance since it is the first time the offeror selection process under Section 7 of the Consumer Product Safety Act was used. It might follow, therefore, that this case would establish precedents for the future selections of offerors. I do not view it that way. The selection of an offeror in the architectural glass case was a first attempt -- and first attempts

are rarely perfect -- which has served to raise policy issues that had not been perceived, or completely thought out, when the regulations were drafted. Also, in retrospect, I think the Commission could have done a better job communicating with the various parties involved in this case.

My comments should in no way be construed as a criticism of the members of the Commission's staff who handled the case. However, I do believe that the Commission should now address the policy questions which have been raised and make efforts to communicate more effectively with all parties involved in subsequent Section 7 proceedings.

II. THE SELECTION OF AN ARCHITECTURAL GLASS OFFEROR

In the Federal Register of May 28, 1974 (39 FR 18502), the Commission initiated the offeror proceeding to eliminate or reduce the unreasonable risks of injury associated with architectural glass. Four offers to develop a proposed standard for architectural glass were submitted in response. All four requested Commission contributions to costs. CSGC requested $451,500, NCL/ASTM requested $166,450, and Dallas Laboratories and Exterior Home Products Manufacturers Association requested $220,000 and $180,000, respectively. While these requests apparently were within the scope of the regulation, it was the feeling of the Commission that all involved rather large sums. For the first time, it became apparent that the offerors and the Commission held markedly different interpretations of the cost-contribution provisions which had been set forth in both the offeror regulations and the Federal Register notice regarding architectural glass.

Moreover, in hindsight, it is not unreasonable for an outside

party to infer from Section 1105.9(f) and (g)(2) of the regulations that the Commission would indeed consider paying salaries to assure adequate consumer participation on standards committees. However, the specific question of Commission payment of salaries to members of standards committees was never explicitly raised, to my knowledge, during the public dialogue concerning the regulations.

On July 11, in Executive Session, the Commission made its first decision with respect to selecting an offeror and in dealing with the cost contribution question. Specifically, it voted unanimously to "negotiate" with NCL/ASTM, whose offer was regarded as the best submitted. The Executive Session minute reads as follows:

> "The Commission decided that the offer made by the National Consumers League/American Society for Testing and Materials came closest to meeting the criteria specified in the regulations issued under § 7 of the CPSA and the architectural glass development notice. Therefore, the Commission has decided to discuss with NCL/ASTM four areas: method for consumer participation, economic analysis, time period for developing the standard and funding level (to include only administrative costs/travel and per diem." (Emphasis added.)

NCL/ASTM was seeking, among other things, cost contributions in the form of salaries for consumer representatives serving on standards committees. The Commission discussed this and unanimously decided to limit possible contributions to NCL/ASTM to administrative costs and to travel expenses and per diem expenses (e.g., hotel and meals) for consumers serving on standards committees. In other words, salaries were not to be paid to anyone serving on standards committees, but all actual expenses of

consumer representatives could be funded by the Commission.[1/]

On July 18 and 19, a CPSC "negotiating team" met with NCL/ASTM in a meeting open to the public. The negotiations ended with no agreement on the matter of funding for consumer representatives. Further, the Chairman relayed to the Commissioners the report that NCL/ASTM was "adamant" in its position on salaries being paid to consumer representatives on the standards committee and that NCL/ASTM was uncompromising on this point.

On the morning of Monday, July 22, the Chairman called an emergency Executive Session because the offeror selection was thought to need immediate attention. The reason was that the May 28 Federal Register notice had announced that a proposed standard had to be developed by October 25, 1974 as a result of the Commission's unanimous determination to adhere to the 150-day "development period" prescribed by Congress in Section 7(b) of the Act. Thus, time was running out and every day counted. Chairman Simpson, Commissioner Kushner and I were

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1/ Also on July 11 the Commission had before it the question of whether to approve a draft Federal Register notice which would initiate an offeror proceeding to develop a proposed standard for another product, power lawn mowers. In a further attempt to clarify its position regarding cost contributions, the Commission approved several changes in that draft Federal Register notice. The Executive Session minute reflecting that unanimous decision provided:

> "The Commission approved the proposed Section 7 Notice for Certain Power Mower Equipment with a change reflecting the Commission's position that funding of offerors will be the exception rather than the rule. The Commission further notes in the Section 7 notice that the offeror process is intended to be a process whereby primarily volunteer resources are utilized."

present at that emergency session -- Commissioners Newman and Pittle were out of town.

At that session, I reluctantly voted to terminate discussions with NCL/ASTM and to open discussion with CSGC, an offeror whose offer was the Commission's unanimous second choice. My vote was based on NCL/ASTM's reportedly "adamant" stance regarding the payment of salaries, the Commission's two unanimous decisions of July 11 regarding cost contributions, and the need to best serve the public interest through prompt acceptance of an offer. However, in so voting, I did not, do not, and will not foreclose the possibility of agreeing to subsidize the compensation of consumer representatives, should that step prove to be necessary in order to assure adequate consumer participation in the development of consumer product safety standards. Again, in hindsight, it might have been wiser to wait until Commissioners Pittle and Newman returned before this crucial vote was taken.

Thus the decision was made and announced at the noon "muncheon" on July 22 that discussions were terminated with NCL/ASTM and that talks would begin with CSGC. At the same time, the Commission insisted that CSGC expand its "plan for consumer participation" so as to include consumer representatives, both "lay" (user) and technical, on committees to be involved with the development of the proposed standard and that CSGC absorb all costs except those involving travel and per diem for consumer representatives serving on standards committees.

Subsequently, CSGC submitted a plan which satisfied the Commission's concern on both counts. In Executive Session on August 6, the Commission accepted CSGC's offer and agreed to contribute $14,175 toward the offeror's cost. It was stipulated that this cost-contribution

was to be used only to reimburse consumer members of the various standard-development committees for travel expenses and as a daily per diem for subsistence expenses. I voted with the majority both to accept the CSGC offer and to contribute to the offeror's cost to assure consumer participation on standards committees.

III. CONCLUSION

It is my understanding that the development process, managed by CSGC, is proceeding smoothly and close to schedule. In response to a recent charge of the Health Research Group that consumer participation in the development process is inadequate, the Commission examined the current status of that participation and expressed its unanimous opinion that there has been "substantial and meaningful consumer participation" thus far. That standards development process has not yet been completed and evaluated.

On the other hand, the offeror selection process did not go quite so smoothly. Unfortunately and unintentionally, it was full of confusion about how Section 7 should and would work and how the Commission should and would select an offeror. To make matters more clear for the public, I believe the Commission should clarify its views on several important issues as soon as possible. They are:

1. Future Contributions to Offerors' Costs

How much should the Commission contribute to an offeror's development costs, and for what kinds of items? Based on the Consumer Product Safety Act and its legislative history, my understanding is that the standards development process is not intended to be a contract or grant process, but a process in which primarily volunteer resources are

utilized. At the same time, the Commission is empowered to contribute to an offeror's cost, if such contribution is likely to result in a more satisfactory standard. Thus, the Commission has discretion to balance fiscal restraint with contributions to ensure a more satisfactory standard. However, the decisions on appropriate cost contributions are not easy ones. Currently, we are making them on a case-by-case basis.

It should also be pointed out that if the burden to provide resources for developing proposed standards is to fall mainly on the private sector and if the Commission's view of appropriate cost contributions is too rigid, the Commission could unintentionally discriminate against the involvement of certain segments of the public in the standards process, e.g. non-profit organizations (consumer organizations, women's groups, etc.) and individual consumers. It is this possibility of discrimination which causes me not to foreclose the possibility of compensation, salaries, fees for service or what-have-you, in order to assure that the consumer interest is clearly and adequately represented in the standards-making process.

At the same time, if the Commission were at some future time to decide to compensate consumer representatives on standards committees, the NCL/ASTM case raises a question as to the fairness of compensating only those representatives with "technical expertise." While the consumer interest needs adequate technical representaion, it also needs the involvement of lay consumers (users) who may not have technical expertise. The predisposition to compensate only technical people might also discriminate against certain members of the public, e.g. those who are not technically trained, but who may have valuable insights

regarding the way a product in a typical home or recreation setting is used.

Quite clearly, the salary question is only one of several issues which can be raised. As the Section 7 offeror process continues other questions can and will be asked about those "allowable direct and indirect costs" which are appropriate for Commission subsidy.

However, I do believe the Commission owes the public some further guidance with regard to its policy on cost contribution -- if only to indicate it will act on a case-by-case basis until the offeror process has been used more frequently.

2. Adequacy of an Offeror's Consumer Participation Plan

Clearly, both industry and consumer interests need to be represented in the standards development process. I believe the Commission should seek to assure adequate consumer participation in that process. The question is how best to do it. Should consumers be offerors, serve on standards committees, testify at hearings, comment on standards proposals, and/or what?

The "what-is-adequate" issue is related to the "what-should-the-Commission-contribute-to" issue, and I think both need clarification so that potential offerors and consumer participants are clear on where the Commission stands. Personally, I am inclined toward adopting guidelines which, at a minimum, would provide for consumer participation in the actual drafting of a proposed standard and which would emphasize a mix of both "lay" consumer representatives (users) and those with appropriate technical expertise in the area relating to the proposed standard.

3. Conduct of the Offeror Selection Process

Throughout the selection of the architectural glass offeror, there was confusion as to what was actually taking place at any given time.

NCL/ASTM was apparently unclear about whether it had been selected as the offeror when the "negotiation process" began. Then, it further questioned what the so-called "negotiation process" was intended to be. Perhaps the term "negotiation" -- which implies give and take on both sides -- should have been replaced by "exploratory discussions." In any event, there was no explicit communication about what the Commission intended. NCL/ASTM reportedly was not even aware at the time it made its "final offer," that this was to be its last chance. Further, I learned later that NCL/ASTM was surprised that its position regarding the salary question had been described as "adamant."

At the same time, CSGC was apparently also confused. For a while, it did not know whether its offer had been rejected and why, and did not understand why the Commission was "negotiating" with NCL/ASTM..

The discussions with NCL/ASTM were conducted at open, rather formal meetings in the Commission's hearing room. As one observer put it, somewhat baldly, "you experimented with a consumer group while its competitors for the offer sat there listening. Then, you threw the consumer group out and gave the offer to an industry group."

Needless to say, this is a gross oversimplification. Clearly, it is not in the public interest to play off one segment of the public against another, and certainly this was not intended. Unintentionally, however, the Commission made NCL/ASTM the "guinea pig" as it attempted to formulate its policy on offerors and cost contribution. Therefore,

I believe that, in fairness to all segments of the public and to other potential offerors, the Commission should clarify how the offeror selection process will work.

Barbara H. Franklin

Barbara Hackman Franklin
Commissioner

October 8, 1974.

CONSUMERS UNION,
Mount Vernon, N.Y., January 9, 1976.

MS. SADYE DUNN,
Secretary, Consumer Product Safety Commission,
Washington, D.C.

DEAR MS. DUNN: Consumers Union hereby respectfully requests that the Commission make an additional payment to Consumers Union to defray a portion of the unreimbursed costs which Consumers Union has incurred as offeror in the development of a power lawn mower safety standard for the Commission.

On July 17, 1975, Consumers Union submitted to the Commission our recommended safety standard for power lawn mower equipment, together with extensive supporting documentation. Subsequent to that time, we have been analyzing and evaluating the costs and benefits of our participation as offeror. The purposes of the analysis were twofold: to determine whether and to what extent, if any, to participate in the development of safety standards in the future, and to determine whether CU should apply to the Commission for additional payment.

We have not completed our study of the benefits of CU's participation, since we do not know what standard will ultimately be promulgated by the Commission. We have, however, identified numerous items of cost already borne by Consumers Union which have not been reimbursed by the Commission.

This request is addressed solely to the readily quantifiable costs already borne by Consumers Union and not reimbursed by the Commission; these costs come to more than $84,000, consisting almost entirely of non-reimbursed personnel costs and associated overhead. The attached table contains a specification of these costs over five relevant time periods. (We do not include those quantifiable and non-quantifiable costs which have been incurred since October 16, 1975, or which will surely be incurred in the future, principally the time required by CU to discuss, defend, explain, and monitor the proposed standard in various forums as it is scrutinized by the Commission staff, the industry, Congress, the courts and the public.*)

The financial loss that Consumers Union has sustained as a result of serving the CPSC as offeror is a matter of grave concern to us for two reasons, both of which should concern the Commission as well. First, the unreimbursed costs of the lawn mower project and the limitations on Consumers Union's financial resources make it most unlikely that it could again undertake any similar effort. As we reported in *Consumer Reports*, during our 1974 and 1975 fiscal years, Consumers Union's expenses exceeded its income. While we do not anticipate any deficit for the current fiscal year, we cannot afford to participate in similar high-cost projects in the foreseeable future.

Second, Consumer Union's experience, while unique because of the distinctive and unprecedented nature of the lawn mower standard development process, is likely to be shared by other non-industry offerors as well. In particular, such offerors may well incur unanticipated but significant and unavoidable costs, both during and *subsequent* to the submission of the proposed standard by the offeror.

The continuing responsibilities intrinsic to service as an offeror have very serious implications for the offeror process as a whole. Clearly, other potential consumer or "public interest" offerors, few of whom possess even the limited resources of Consumers Union, will be deterred if the process is likely to produce a loss. Since Consumers Union was the first non-industry group to serve as a sole offeror, its experience as offeror is certain to be watched closely by other potential offeror organizations.

We believe that the proposed standard and supporting materials which we have submitted are of the nature and quality sought by the CPSC, and a substantial achievement in view of the novelty and complexity of the offeror process. Because of that novelty and complexity, both Consumers Union and the Commission operated at a serious disadvantage in anticipating reasonable and necessary reimbursable cost items at the time of the acceptance of our offer almost a year and a half ago. Nor did the Commission or CU anticipate the considerable sums which would be spent by industry in participating in the development process and in criticizing the result. The offeror process was unprecedented, and had not yet been fleshed out with experience. The complexity, costliness, and controversial nature of the lawn mower standard development process was not yet fully ap-

* To cite just one example: criticism of CU's proposed standard by OPEI and the Council on Wage and Price Stability has required considerable staff time for evaluations of, and preparation of appropriate responses.

parent to many of the participants. That experience and understanding is now available to us.

In light of that experience, we respectfully urge the Commission to review the reimbursement issue. If the earlier reimbursement decision had any rationale at the outset of the offeror process, when the Commission was gathering experience, we now know that adhering to that decision will defeat the purpose of the process. Without adequate reimbursement of consumer group offerors with demonstrated technical competence, only well-financed industry groups will seek to become offerors, thus leading to industry domination of the process, a result that manifestly contradicts the will of Congress and the oft-expressed intent of the Commission.

Accordingly, we request that the Commission reimburse Consumers Union for unreimbursed costs actually and necessarily incurred in performing its role as offeror, in the amount of $84,131, as described above, and set forth in the attached table. We would be pleased to provide any documentation that you may require, and to meet with you to discuss this application.

We look forward to an early response.

Very truly yours,

RHODA H. KARPATKIN,
Executive Director.

TABLE OF NONREIMBURSED EXPENSES

Time period [1]	Nonreimbursed personnel costs	Overhead for nonreimbursed personnel (25 percent)	Other expenses [2]	Total
I	$8,577	$2,144	$440	$11,161
II	6,529	1,632	429	8,590
III	26,103	6,526		32,629
IV	2,554	638		3,192
V	3,042	761	1,325	5,128
Total nonreimbursed personnel costs, including overhead, plus other expenses				60,700
Overhead on reimbursed personnel costs (25 percent times $93,772)				23,431
Total nonreimbursed costs				84,131

[1] Definition of time periods:
I—Prior to Aug. 21, 1974: preparation of the offer.
II—Aug. 22 to Sept. 27, 1974: preparation of the preliminary standard.
III—Sept. 27, 1974 to July 17, 1975: standard-development period and filing.
IV—July 17 to Aug. 1, 1975: collection of additional supporting materials for submission to CPSC.
V—Aug. 1 to Oct. 16, 1975: continuing followup activities.

[2] Other expenses include miscellaneous expenses (e.g., telephone, copying, postage) and travel expenses during, for example, preparation of offer and followup meetings.

[3] Period V does not include costs that have been incurred since Oct. 16 or which may be incurred in the future.

NATIONAL CONSUMERS LEAGUE,
Washington, D.C., January 27, 1976.

Hon. JOHN E. MOSS,
Chairman, Oversight and Investigations Subcommittee, Committee on Interstate and Foreign Commerce, Washington, D.C.

DEAR CONGRESSMAN MOSS: I understand that on Friday, January 30, 1976, your subcommittee will be holding an oversight hearing with regard to the Consumer Product Safety Commission. I note that in your "Recommended Components of Agency Head's Statement", item number three covers the subject: "Adequacy of Public and Consumer Participation in the Regulatory Process."

The National Consumers League is pleased that you have included this most important subject as one of the subjects of the oversight hearings. As you are undoubtedly aware, the League has had first hand experience with the CPSC on this subject. We were the very first consumer organization to bid to become an offeror under Section 7 of the CPSA; and, in that instance (architectural glass), we were initially selected to develop the standard. In negotiations with the CPSC, however, we were unable to convince the CPSC to allow us sufficient funds to retain the kinds of experts necessary to properly represent the consumer interest, so the CPSC contracted with an industry group instead of us to develop

the glass standard. Subsequently, we organized all of the consumer input into the development of the bookmatch safety standard, where the ASTM was the selected offeror. In that instance, financial support was not at issue, since ASTM underwrote all of the costs of consumer representation.

Thus the League is intimately familiar with the standards setting process as administered by the CPSC. Furthermore, I personally served on the Advisory Committee established under the CPSA, until my resignation in 1974. It is on this base of knowledge and experience that this letter is written.

I think it very important that the CPSC be questioned hard on the offeror process. The National Consumers League, along with many if not all other consumer organizations, is very disturbed as to the future of the process, unless the CPSC removes a major stumbling block to effective consumer participation, namely, inadequate financial support.

The offeror process was developed by the Congress as an alternative to other ways of setting safety standards. Congress rejected the "traditional" method of simply directing the CPSC staff to prepare draft standards, subject them to a public hearing, and then finalize them. There was too much concern that the staff would not have the technical capacity to develop the best possible standards.

On the other end of the scale, the Congress rejected the notion that voluntary consensus standard sought to be codified into law, except in those cases where the CPSC made a specific finding that they were adequate.

Instead, the offeror process was written into the law. The rationale was that by broadening the base of (1) who would be able to manage the development of the standard, and (2) who would be able to participate in the development of the standard, better standards would result. Furthermore, Congress wisely recognized that consumer groups and other public interest groups would have a difficult time participating either as offeror or as participants *unless* financial support was forthcoming.

When the CPSC published its rules and regulations implementing the offeror process, the NCL and most other consumer groups we know about were delighted. There seemed to be a clear recognition on the part of the Congress that the offeror process would only work *if* groups other than industry groups bid to become offerors, and if citizen and consumer groups actively participated in standards-setting activities whoever was the accepted offeror. The disillusionment came not with the law or the rules, but with their implementation.

We were the first consumer group, as mentioned above, to run up against CPSC unwillingness to fund consumer activities at a meaningful level. The situation has been repeated since then. In an attachment to this letter, there is included a complete record of our experiences, as told to the Senate Commerce Committee last year when that Committee held oversight hearings on the CPSC.

Since that time the fears expressed then have proven to be well founded. To date, only one consumer organization—Consumers Union—has been the selected offeror. What is most disturbing is that CU has publicly stated that it doubts it will ever again bid to become the accepted offeror unless the CPSC increases substantially the amount of financial support it is willing to give consumer and other public-oriented offerors.

Some have stated that it really doesn't make any difference who is selected as the offeror, and that the real issue is simply to be sure that there is adequate consumer representation regardless of who is the offeror. It is, in my opinion, both incorrect and dangerous to state the issue that way. It is of course true that there should be adequate consumer input regardless of who is the selected offeror. But it is also true that the offeror process, if it is to work as Congress intended, *requires* consumer groups to submit offers and to be the selected offeror in at least a significant portion of standards-development proceedings.

The reason that is true is obvious if one carefully considers the legal role of the offeror. It is not true that the offeror is only a manager of the process—one who "provides the table around which everyone else sits." If that were the case, professional meeting organizers would be the ideal offerors. No, the offeror, while duty-bound to conduct a standards-setting proceeding according to law, has tremendous influence on the outcome of the draft standard. As a matter of fact, nothing in the law or the rules thereunder requires the offeror to submit either a consensus standard or a standard agreed to by a majority of the participants. What the offeror must do is be certain that all parties have an opportunity to participate, and that all positions unaccepted by the offeror be clearly singled out and passed on to the CPSC with the offerors suggested standard. But the offeror is within his rights to submit whatever standard he feels is most adequate—even,

theoretically, if every single participant in the standards-setting activity disagrees.

Let us suppose that because of insufficient funding, no consumer groups were willing to become offerors. That would immediately raise the question, why have an offeror process? If all we are concerned about is strong consumer input, then why not amend the CPSA and have the agency write the standards, with a provision that the agency seek consumer input (and pay for it) in the development process? Clearly that would be superior to an offeror process that on paper held out the promise of consumer offerors, but in reality led only to industry offerors.

The National Consumers League is not ready to scrap the offeror process. We believe it to be one of the most innovative ideas in a long time to improve consumer input and participation into a key regulatory function—the setting of safety standards. It is not the process that is wrong, but the administration of the process.

A hard look at the administration of the offeror process will show that the CPSC has grossly underestimated the real costs of standard setting. I believe you will find there to be unanimous opinion among industry, consumer, and voluntary standards-setting organizations that the expense of setting a standard is in almost every case a half-million dollar venture or more. Certainly industry has and should bear a large share of these costs, in the sense that much of the cost is the cost of industry participation. But consumer groups cannot afford the large outlays of funds necessary to fully participate. And consumer groups are in even a more vulnerable position to bear the costs of administering the development process, as an offeror. For example, CU has just asked the CPSC for an additional $80,000 to make up the costs it had to bear as an offeror—and this is $80,000 over and above the amount already received from CPSC.

If you look at the CPSC budget, you cannot find any sum of money that would come close to paying for either consumer participation in an offeror's project, or for the underwriting of consumer offerors. I believe I am correct that the Chairman of the Commission is on record as having stated that the CPSC anticipates expending around $30,000 in the way of financial support to consumers in the average standards-setting activity. That sum is hardly sufficient to pay for consumer input into the most simple standards setting activity, when some other group is the offeror. There is no way a consumer group can even think of becoming an offeror unless at least three or four times that amount is available for administrative costs, and adequate technical backup—and even more in a complicated project.

Good standards cannot come cheaply—whether the government staff writes them or whether the offeror process is to be utilized. The fact of the matter is, while "volunteers" are useful and can be of immeasurable assistance to consumer groups, they cannot be depended upon to provide all or even most of the technical work on the standard.

I believe that it would be very beneficial for your Committee to explore the funding issue in depth at the oversight hearings.

Very truly yours,

DAVID A. SWANKIN,
Counsel to the League.

[The attachment to Mr. Swankin's letter is in the subcommittee's files. The testimony referred to is Hearings on S. 644 and S. 100 before the Subcommittee on Consumers of the Senate Committee on Commerce, 94th Congress, 1st session, Serial No. 94–12, at pp. 89–99 (1975).]

BUSKE ENGINEERING,
Stamford, Conn., February 2, 1976.

Re Consumer Product Safety Commission.

Mr. JOHN E. MOSS
Room 2354 Rayburn House Office Building,
Washington, D.C.

DEAR MR. MOSS: I note the reference to the recent testimony of Mr. Richard Simpson of the Consumer Product Safety Commission before your subcommittee, and discussion of the future role of CPSC.

I have been interested in safety for many years, and have been involved in some aspects of it, and have recently been involved in some of the CPSC activity, regarding power lawn mowers, and feel I must pass on to you some of this most unhappy experience.

I feel that I should document some of the things, so you will know that this letter is not written out of thin air.

Sheet *1* is general background information about me. (Each sheet is marked.)

The two sheets marked sheet *2* document my seven years of participation in the writing of the original safety standards for power lawn mowers. These standards, B71.1, have been revised and reissued in 1964, 1968, 1972, and 1974.

Sheet *3* refers to work toward safety standards for chain saws.

Sheet *4* is regarding work on one of the committees of CU, who was the offeror that developed the new proposed standards for lawn mowers.

The two sheets marked *5* are an invitation from Mr. Simpson to come to D.C. to offer suggestions to CPSC for development of future standards. I did attend the meeting, and did suggest.

Regarding CPSC, and the proposed new standards for lawn mowers, I agree that new and tighter standards (tighter than the present B71.1–1974) should be developed, and these perhaps should be mandatory. I disagree completely with how CPSC went about it, and in two areas.

When the first B71.1 committee met in 1955, and we started to ask ourselves how we would specify designs for safe lawn mowers, we asked how people were getting hurt, so we could specify changes to reduce the number of injuries. So the first thing that had to be done was to get information about accidents, and I did this, and then we proceeded. Today, with information obtainable through NEISS, which could have been of the same help here, *if* it had been brought to bear, the various committees had to proceed without really meaningful information. For instance, the B71.1–*1972* were tightened up a great deal. Information should have been and could have been made available to indicate how much good this had done, and this would have had a heavy bearing on the new proposed standards. Yet none of the small amount of NEISS information furnished us indicated which accidents were caused by which vintage of mowers. You simply cannot tell from the NEISS information we had whether a given mower was made in 1968 or 1973.

As you may know, the mower engines are date coded, if you know the code, and it is common knowledge how to read it. So this information could have been obtained for the NEISS "in depth" studies of individual accidents.

What I'm saying is that CPSC went ahead on this program without the proper preparation, and people sat around tables proposing that a certain thing be done because it "should" make a safer mower, and there was not a soul there who really knew.

The other thing that was done wrong was to accept as an offeror a concern that considers themselves a "Consumer Advocate", as the CU project director stated at the August 6 meeting, in D.C.

What an offeror must be, in my opinion, is an advocate for American Society, which covers the whole spectrum of consumers, manufacturers, and all of this society. In my opinion, the first meetings (they later improved) were very anti-industry oriented on the part of CU, the offeror. As a direct result, the meetings were polarized, and cooperation was very poor. One simply cannot get the best standard out of such an atmosphere.

For my part, when I heard that CPSC was about to write standards for mowers, I volunteered to assist, as I thought my knowledge might be of help, and I wanted to try to do something that would help in a field that I know well. It was not a rewarding experience. I saw first hand how an agency of our government can take a worth-while program and really foul it up, by just not organizing it properly. During the program I wrote to CPSC's Simpson, Pittle, and Ehrlich (a copy of the letter to Simpson went to Pittle), and never received a reply to either letter.

It is very easy, and become popular, to sit around and gripe about how things are not done right in Washington. I've done some of it too.

So when this opportunity came along to pitch in and help in something that needed doing, and was in my field of knowledge, I decided to try to help.

Unfortunately, I saw, from the inside, just how CSPC went along, picking an offeror who represented, in his mind, the consumer, and not society, and in asking committees to write standards to prevent accidents with a type of product without giving them any meaningful information about how people are getting hurt with those products. I think we had more meaningful information in 1955 or 1956 about how people were getting hurt with power lawn mowers, to use in writing the 1960 standards, than we had in 1974 and 1975 in writing the proposed new standard.

I hope you can do something to help get CPSC on the road. They simply must get some people in there with some practical knowledge, it would seem, if it can be made to work.

In my opinion it is ridiculous to suppose that you can write standards to cover every conceivable hazard, including "those that haven't been invented yet" at a cost that is reasonable for the finished product.

Very truly yours,

G. E. BUSKE.

[The enclosures to Mr. Buske's letter have been retained in the subcommittee's files.]

APPENDIX H

A. STRATEGY OF REDUCING UNREASONABLE RISK OF INJURY ASSOCIATED WITH CONSUMER PRODUCTS

1. Purpose

The strategies and policies pursued by CPSC depend in large part upon the selection of a finite goal for accomplishing the regulatory task. The goal selected by CPSC is based on a projection of preventable injuries on a product-by-product basis and on the ultimate costs and effectiveness of the safety standards selected for development and promulgation. Upon attainment of an effective body of regulations, CPSC would then revert to monitoring these rules and surveillance of imminent and substantial hazards, at substantially reduced cost to the public. The following analysis summarizes the approach and conclusions.

2. Injuries Preventable by CPSC Action

During 1974, NEISS injury reports were a basis for a national estimate of 6,340,000 product-related injuries requiring emergency room visits. Using a separately obtained estimate of the proportion of all product-related injuries processed through emergency rooms, a total injury figure of 16.7 million is obtained. CPSC views this as a low figure in that some types of injuries, e.g., death, burns, electric shock, and poisonings, are believed to be underestimated in the NEISS sample. A study based on data from the National Center for Health Statistics places the number of injuries at 21 million per year. Since the analysis described below is based on percentage of total injuries, the absolute number of the total injuries is not critical. What is more important is that a consistent data base is used in developing the total injury estimate and the effectiveness of CPSC actions.

Casual patterns in a number of product categories were analyzed to determine the fraction of injuries that could be prevented by product safety rules. The analysis showed approximately 17% as a representative figure for the reduction in injuries that might be expected from a reasonably "adequate" rule governing the design and performance of selected consumer products. This leads to an overall estimate of about 2.8 million injuries per year as the target universe for regulatory action by CPSC. The universe of preventable injuries could be significantly increased by information and education campaigns aimed at curbing misuse and abuse of products leading to injury, by efforts to amplify and capitalize on the effectiveness of voluntary standards, and by an expanded program to address chronic hazards.

(Reprinted from Consumer Product Safety Commission Justification of Appropriation Estimate for the Congress, Fiscal Year 1977.)

3. Approach to the Regulatory Task

Under the provisions of the Consumer Product Safety Act, the primary tool for increasing safety of products on a permanent and continuing basis is a mandatory standard. The Commission is encouraging voluntary standards development activities as a supplemental means of reducing injuries. Through this encouragement it is expected that more responsibe voluntary standards will be developed by the system over time, serving to reduce the risk of injury to consumers at significantly lower Federal cost than would be required by a totally mandatory standard strategy. The following analysis, however, addresses the scope of the injury problem with heavy reliance on mandatory rules at the outset. In the near term, mandatory rules are expected to be necessary as the primary means of reducing unreasonable risk of injury. At the same time, the initial reliance on mandatory rules is expected to promote deeper interest by industry in self regulation through voluntary safety activities in later years. Informational and educational activities also help and are most effective when conducted in conjunction with, and in support of, a newly promulgated standard. Simultaneous encouragement of voluntary standards' development activities will also help reduce injuries. However, the following analysis addresses the scope of the injury problem to be solved by mandatory rules, which are expected to continue to be a primary means of reducing the unreasonable risk of injury:

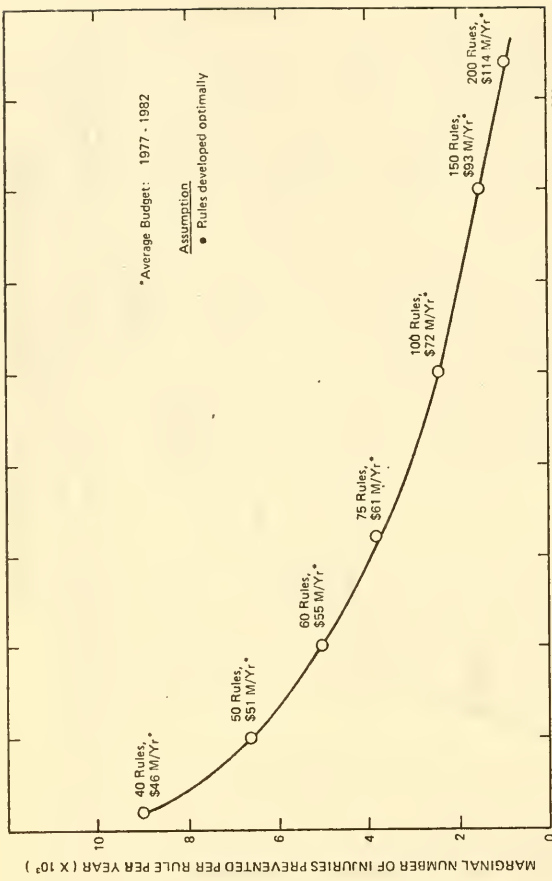
a. The graph in Figure C-1 shows the number of standards as a function of percent of the injury problem covered and the marginal reduction in injuries per regulation per year. The graph shows, for example, that 40 regulations would cover about half of all potentially addressable injuries, and that the 40th rule would prevent about 10,000 injuries per year when the rule was fully effective. One hundred rules would reach about 75% of all preventable injuries, and the 100th rule would result in a reduction of injuries of about 2,400 per year.

   A critical assumption underlying this analysis is that rules will be developed optimally, i.e., that the first rule will address those products having the largest number of injuries preventable through performance or design control. In the past, CPSC's limited budget has confined rule making primarily to response to petitions and hazard reports. With increased resources CPSC would be able to exercise selectivity in order to optimize choices for regulatory action.

b. Figure C-2 shows the trade-offs between three important variables. These variables are:

MARGINAL NUMBER OF INJURIES REDUCED PER YEAR PER RULE VS.
PERCENT OF PROBLEM SOLVED AND NUMBER OF RULES COMPLETED.

FIGURE C-1



Relationship Between
Marginal Number of Injuries Prevented Per Rule,
Percent of Problem Solved,
Number of Rules Effected and Average Annual Budget

FIGURE C-2

(1) Marginal number of injuries prevented per rule per year,

(2) Percent of injury problem addressed by rule development, and,

(3) The required average annual CPSC budget for the 1977-1982 time period.

The analysis underlying this chart is based on assumptions concerning rule development cost and average product life. The analysis strongly favors a rapid concentrated schedule of rule development in order to realize higher levels of protection at least cost. One hundred standards developed in 10 years, e.g., 1973 * through 1982, will prevent about 4.5 million more injuries than 100 standards developed over 20 years at a rate of 5 per year. After careful study of the analysis and its implications, CPSC proposed the goal of achieving 100 mandatory rules in effect by the end of 1982. This goal would require an average annual budget of $71 million over these six years. The goal would address about 75% of the preventable injuries, and the 100th rule would prevent about 2,400 injuries per year, thereby reducing the overall problem to more reasonable levels - possibly enough to change the character of the Agency to a maintenance or "enforcement only" level of effort. Alternatives would be to abolish the Agency altogether or expand its mandate. Achievement of the total injury reduction goal will, of course, not occur until the stock of noncomplying items in use is exhausted, which will be somewhat later, depending on average product life.

B. PROPOSED STRATEGY FOR EARLY ATTAINMENT OF GOAL

CPSC's overall goal of promulgating 100 mandatory rules by the end of 1982 at an average appropriation level of 71 million dollars for the period 1977-1982 would imply the following rule development schedule and annual budget:

* 1973 was the year that the product safety problems became a national priority sufficient for Congress to establish the CPSC.

	1975	1976*	1977	1978	1979	1980	1981	1982
Rules Developed	2	9	10	12	14	15	15	11
Rules in Effect	14	23	33	45	59	74	89	100
Annual Budget Positions	890	1024	1226	1395	1635	1830	1870	1870
Dollars (Millions)	$37	$54	$55	$63	$73	$82	$82	$70

* Include transition quarter

As with any long-term plan, the accuracy of the budget estimate in the more distant years must be verified by continual monitoring and evaluation of the overall strategy. An important consideration and a force which would serve to reduce budget estimates in the later years, thereby decreasing the average budget requirement over the ten-year period, would be the Commission's success in establishing an effective industry self-regulation system through voluntary safety standards. If some proportion of the 100-standard goal were offset due to effective self-regulation, it is conceivable that either the ten-year planning time frame could be shortened or a significant reduction in later year budget estimates would be realized.

At the outset, however, the most prudent planning decision is to continue with the objective of mandatory standards, for planning purposes, while noting the contingency of budget estimate reduction in distant years, if industry self-regulation proves to be a successful supplement to mandatory safety standards. Emergence of successful self-regulation would also lend support to the earlier supposition that CPSC could, in the future, be reduced to a maintenance level budget supporting enforcement operations while developmental activities were replaced by the voluntary standards it has effectively encouraged in its earlier years.

The goal for 1977 would be the promulgation of 10 additional mandatory product safety rules at an annual budget of 55 million dollars. The program strategy to accomplish this goal would emphasize rule development activities while holding other programs to the level required to support rule development, enforce rules, and maintain CPSC's capability to respond to petitions, substantial hazards, and other demands.

CPSC would also encourage voluntary standards development at substantially less cost than mandatory rules. However, voluntary standards cannot at this time presume to be as effective as mandatory rules. Initial reliance on mandatory rules is expected to encourage subsequent industry observance of voluntary standards.

APPENDIX I

Description of U.S. Consumer Product Safety Commission Consumer Deputy Programs

TOY SURVEILLANCE - CHRISTMAS 1973

In an effort to monitor the marketplace for banned toys during the 1973 holiday season, the U. S. Consumer Product Safety Commission enlisted consumer volunteers to survey retail establishments throughout the country as Consumer Deputies. The program began on October 1, 1973 and ran for three months.

This program was primarily oriented toward voluntary compliance in getting banned toys off retail shelves. In addition, it was designed to begin a formal program of cooperation with notivated consumers and consumer groups and to evaluate this interaction, as well as increase consumers', retailers', and industry awareness of CPSC activities.

There were 989 consumer deputies participating in the 1973 program, including seventy-four different consumer organizations.

One thousand four hundred thirty-nine stores were surveyed by the consumer deputies. The deputies found 323 stores with possible banned toys (a toy listed in the Banned Products List). The store managers were asked to remove the possible banned toys from their shelves and check with their suppliers to confirm the status of the toys. CPSC officials subsequently visited 67 of these stores, and found only 7 stores still selling possible banned toys.

Overall, the program fulfilled its objectives. Public awareness of toy safety and the CPSC was enhanced because of the widespread favorable publicity, and follow-up investigations indicated significant cooperation by store managers in removing banned toys from their shelves at the request of the consumer deputies.

POISON PREVENTION PACKAGING - ASPIRIN AND FURNITURE POLISH

The second CPSC Consumer Deputy Program utilized consumer volunteers to check supermarkets, pharmacies, hardware stores, and other retail outlets for compliance with mandatory Poison Prevention Packaging Act regulations for aspirin and certain kinds of liquid furniture polish.

The program began during National Poison Prevention Week, March 17-23, 1974, and lasted six weeks.

One hundred fifty-eight deputies (including employees of two state agencies--the Ohio Department of Health, Accident Prevention and Product Safety Unit;

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and the New York State Department of Health, Burn Care Institute) visited 1307 retail outlets.

A large percent of the surveyed stores (44%) were selling aspirin or furniture polish not meeting current regulations, but still in compliance because they were manufactured prior to the effective date of the regulations (January 10, 1973 for aspirin; and September 13, 1972 for furniture polish). In that aspirin packaged as early as 1966 was found in the marketplace, we can assume that products not meeting current regulations, but still in compliance, will be found in the marketplace for some time to come. In almost all cases, store managers cooperated with the Consumer Deputies, and many field comments indicated that this program served as an excellent educational tool.

TOY SURVEILLANCE - 1974

The objectives of the third CPSC Consumer Deputy Program were (1) to encourage removal of banned toys from the marketplace, (2) to develop recommended prosecutions against those retailers who after a CPSC follow-up continued to sell banned toys, (3) to continue a formal program of working with consumers and consumer groups, and (4) to increase public awareness of Commission activities through publicity of joint CPSC/consumer group accomplishments.

One thousand one hundred sixty-eight deputies visited 2,761 stores nationwide, and found suspected banned items in 339 stores. CPSC conducted 120 follow-up visits, and found small numbers of banned items in 20 of those stores. However, it was determined that these items were manufactured prior to 1973, and that the manufacturers involved had since changed their product design and/or construction to eliminate the potential hazards found in the earlier toys.

In 1974, the consumer deputies found fewer banned toys than in 1973, and found retailers to be more conscientious in keeping banned toys off the shelves.

CHILDREN'S SLEEPWEAR

The fourth Consumer Deputy Program, initiated May 14, 1975, was organized to assist the Commission's surveillance staff in surveying the marketplace to help determine the degree of retailers' knowledge and compliance with the requirements of the regulations for flammability of children's sleepwear.

Specifically, the program addressed the retail display requirements of the regulations for children's sleepwear, sizes 7-14 (FF 5-74) and sizes 0-6X (DOC FF 3-71), dealing with labeling, recordkeeping, retail display, and guarantees.

Two hundred consumer deputies visited 703 stores in twenty states. Of the 703 stores, 637 carried size 0-6X sleepwear, and 605 carried size 7-14. Required signs were displayed in 84 stores carrying the 0-6X sleepwear, and 62 stores carrying sizes 7-14.

Overall, the deputies found most stores to carry some flame-resistant (FR) sleepwear; however, there is still a considerable amount of old stock (manufactured prior to the standard) on hand. Deputies found that at least 3/4 of the stores which carried both FR and non-FR sleepwear did not segregate the products, as required by the regulations. Since it appeared that many of the stores were unaware of the requirement, the Consumer Deputy Program indicated that this subject is a good candidate for future information and education programs for retailers.

POISON PREVENTION PACKAGING - DRAIN CLEANERS, OVEN CLEANERS, LYE PRODUCTS

On May 19, 1975, the CPSC began its fifth Consumer Deputy Program, a three-month nationwide survey of retail stores to check compliance with federal labeling and child-resistant packaging regulations for certain household products, chiefly drain cleaners, oven cleaners and lye products.

Three hundred ten consumer deputies (many of whom had participated in past Consumer Deputy Programs) visited 1266 stores, and reported 140 products which might have warranted CPSC follow-up activities. Generally, however, follow-up showed a high degree of compliance.

Apparently, the consumer deputies had difficulty recognizing child-resistant closures and reported possible non-compliance when actually the product was in compliance. Also, CPSC review of the deputies' reports showed that many products reported were packaged prior to the effective date of the regulation and were not subject to the regulation.

CHRISTMAS LIGHTS

The Consumer Product Safety Commission's sixth Consumer Deputy Program was initiated to canvass stores for potentially hazardous Christmas lights.

The program was scheduled to begin on November 1, 1975, but the National Ornament & Electric Light Christmas Assocation, Inc. obtained an injunction against the start of the program. On December 5, after hearings and a successful appeal removing the injunction, the program started with deputies making store visits; however, the delay did weaken the program. Some Area Offices were unable to reactivate their volunteers; as many as 92 individual consumers and 26 consumer groups who had been trained failed to participate.

Many store managers refused to allow the survey to be conducted citing crowded store conditions, confidence that lights were safe, and directives issued permitting surveys only when stores were closed and by appointment. Another effect the delay had on the program was that deputies repeatedly visited stores that were "sold out" of lights because it was so near Christmas.

One hundred twenty deputies participated in this program visiting 441 stores in 17 states. Deputies found 104 stores had reportedly checked their lights for safety prior to the deputies' visit and that, another 211 agreed to do so based on the information the deputies provided.

Overall, the program did not reach its full potential of consumer involvement, store visitations or product identification for various reasons due to the delay. However, publicity involving the program was extensive.

[Source: Consumer Product Safety Commission]

APPENDIX J

DISSENTING OPINION OF COMMISSIONER PITTLE DISCUSSING CHILD PROTECTION AND TOY SAFETY ACT

CONSUMER PRODUCT SAFETY COMMISSION

OF THE

UNITED STATES OF AMERICA

Re: Aluminized Mylar Kites Manufactured by Little Peoples Kites, Inc. et al.	))))	ND 74-113
and		
Aluminum Baseball and Softball Bats Utilizing "Hitter's Pride" Grips	)))	ND 75-18

DISSENTING OPINION OF
COMMISSIONER R. DAVID PITTLE

PITTLE, COMMISSIONER: On May 29, 1975, a majority of this Commission voted to approve the staff's recommendation to commence adjudicative proceedings under Section 15 of the Consumer Product Safety Act (CPSA)[1/] against all known manufacturers of aluminized mylar kites. On June 19, 1975, the majority also voted the same action against a number of manufacturers of aluminum ball bats employing Eaton "Hitter's Pride" hand grips. On October 30, 1975, Notices of Enforcement were issued against the kite manufacturers and on November 5, 1975, Notices of Enforcement were issued against the bat manufacturers.

1/ 15 U.S.C. § 2051 et seq.

In the case of the aluminized mylar kites, CPSC staff alleges that once such a kite becomes entangled in a high-voltage power line and a person touches part of the kite, such as the long tail, a severe electrical shock might result. In the case of the aluminum bats, the staff alleges that an improperly maintained Eaton "Hitter's Pride" grip may permit disengagement of the bat stem when the bat is swung and result in severe bodily injury if the bat stem strikes a bystander.

Having examined the briefing packages which detail these hazards, I agree with the majority that regulatory action should be taken by the Commission. However, I believe this action should be taken under the Federal Hazardous Substances Act (FHSA)[2/] and not under the Consumer Product Safety Act.

I

A threshold determination must always be made by the Commission prior to undertaking any action to regulate a product under the Consumer Product Safety Act. Section 30(d) of the CPSA states in part:

> A risk of injury which is associated with consumer products and which could be eliminated or reduced to a sufficient extent by action taken under the Federal Hazardous Substances Act...may be regulated by the Commission only in accordance with the provisions of [this Act]. (Emphasis added)

2/ 15 U.S.C. § 1261 et seq.

This section is not discretionary. If the Commission could eliminate or reduce to a sufficient extent the risks of injury associated with aluminized mylar kites and aluminum baseball bats with the "Hitter's Pride" grips under the FHSA, it must do so even though it might prefer to use a different act.

Can the Commission adequately regulate these kites and bats under the FHSA? If these products fall within the FHSA's jurisdiction, I believe it is abundantly clear that the FHSA can adequately protect consumers from the hazards alleged to be associated with them. In fact, the Child Protection and Toy Safety Act amendments to the FHSA, under which action would be taken in these instances, are to my mind superior to the CPSA provisions which the majority has decided to use. Prior to a full discussion of this point, I shall consider the question of FHSA jurisdiction.

Section 2(f)(1)(D) of the FHSA defines a "hazardous substance" as any "toy or other article intended for use by children which...presents an electrical, mechanical, or thermal hazard." The Act does not further define what is a "toy" or what is an "article intended for use by children." The legislative history, while somewhat helpful, does not completely clarify the situation. The House Committee Report lists as examples:

> games; dolls, stuffed animals, and other toys; swings, slides, seesaws, and other playground

equipment; sleds, toboggans, bicycles, tricycles, and other recreational equipment; infants' carriages and strollers; slatted, netted, or lidded cribs and other nursery equipment; children's furniture; science and construction kits; children's footwear; and sports equipment[3].

The Senate Committee lists similar types of examples and also adds that any item "normally presented to the child for his amusement...[or] normally used for children in close proximity to them[4] is covered by the FHSA.

Two courts have addressed the question of what is a toy or other article intended for use by children. In R. B. Jarts v Richardson, 438 F. 2d 846 (2d Cir. 1971), a lawn dart manufacturer challenged a regulation, promulgated by the Food and Drug Administration (FDA) pursuant to the FHSA, which banned lawn dart games intended for use by children and required games intended for use by adults to carry statements warning purchaser to keep the product out of the reach of children[5]. The regulation further forbade the sale of lawn darts in toy stores or store departments dealing predominantly in toys or other childrens' articles[6]. The manufacturer argued that it had always marketed lawn darts as an adult game which children should use only under

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3/ H.R. Rep. 91-389, 91st Cong., 1st Sess. 9 (1969), U.S. Code Cong. and Admin. News 1969, p. 1236. Bats and kites seem to fit easily into this list.

4/ S. Rep. No. 91-237, 91st Cong. 1st Sess. 5 (1969).

5/ 16 C.F.R. § 1500.18(a)(4).

6/ 16 C.F.R. § 1500.86(a)(5)(iii).

adult supervision[7] and that, accordingly FDA could not legally ban the game. Prior to finalizing this regulation the FDA abandoned any attempt to completely ban lawn darts. However, it argued in court that, as a matter of law, it had the authority to do so under the FHSA if it wished. According to FDA, lawn darts could be considered a "toy or other article intended for use by children" under the FHSA even though the intended use by children was under adult supervision.

The court refused to rule on all of these arguments. It did not declare the regulation illegal as requested by the manufacturer nor did it rule that FDA could have banned all lawn darts if it so desired. Addressing only the issues before it, the court characterized lawn darts as an article "intended primarily for use by adults but also for use by children when playing with them[8]." The court then stated:

> When the two sections added to the Regulations are read together, as they must be, they do not say that lawn darts are a "toy or other article intended for use by children" semper et ubique. They say lawn darts are such when and only when they do not carry a warning that they are "Not a Toy for Use by Children" and when they are "sold by toy stores or store departments dealing predominantly in toys and other children's articles." A manufacturer, knowing that lawn darts can be and have frequently been used by children, who refuses to label them as "not a toy for use by children" or to refrain from selling them in toy stores or toy departments, can hardly be heard on this record to deny that

7/ It had placed the legend, "CAUTION: SHOULD BE USED ONLY UNDER SUPERVISION OF ADULTS" on all of its boxes.

8/ 438 F. 2d at 852.

> darts which are sold in toy stores are a "toy or other article intended for use by children." (438 F. 2d at 853-854).

The other case in which the question of what is a "toy or other article intended for use by children" arose is United States v An Article of Hazardous Substance Consisting of an Undetermined Quantity of Banned Dolls, No. CV 74-1884-DWW (D.C. Cal., filed September 18, 1974) (hereafter, the Bradley case). In a memorandum opinion delivered from the bench, the Court refused to uphold a government seizure of a number of dolls containing straight pins. The Court noted that the record indicated that the dolls were generally for sale only in adult gift stores and were advertised as center pieces for wedding cakes, or as gifts for brides or bridesmaids. Further, none of the company's catalogs displayed the dolls with a child, near a child or in a children's setting. The Court stated:

> The key that [sic] the Court believes is the determination as to whether or not the articles seized are toys or other articles intended for use by children. The principal issue to be decided under that is whether they are articles intended to be used by children, because if they are, they would most certainly have to be considered as toys.... It seems to the Court perfectly plain, if the intention that is meant in that phrase "articles intended for use by children" is the intention possessed by the person who places the article in commerce, either his actual or it's [sic] in this case, the corporation's actual intention, or the intention that the claimant can be said to be bound by on the basis of what is reasonably

> foreseeable by the claimant considering the knowledge, business experience, price, appearance, conduct in the marketplace in regard to these articles, and the actual use by the ultimate consumers of this product, and any other matter that would tend to suggest to the party putting these dolls in commerce that their ultimate destination will be at a place where they will be considered as toys or to be used by children... there is no evidence in the Court's view that the claimant had any actual intent that the seized articles had been considered as toys (opinion, pp. 9-10).

In addition to these Court decisions, the Commission itself, on several occasions, has addressed the question of what is a toy or other article intended for use by children. In its invitation for offers for the development of a standard for swimming pool slides, the Commission chose to utilize the CPSA rather than the FHSA although it recognized that such slides could be regulated under the FHSA. The Commission stated its reasons as follows:

> [I]njury reports concerning swimming pool water slides indicate that many of the most severe injuries associated with swimming pool water slides have been sustained by adults. While regulations adopted pursuant to the Federal Hazardous Substances Act might be adequate to eliminate or reduce injuries associated with swimming pool water slides incurred by children, the Commission does not believe that the scope of regulations developed under that Act would be broad enough to adequately protect adults. The Commission reaches this conclusion because such factors as the weight of adults, their velocity when entering a pool and their entry angle into the pool necessitate considerations different than those used for children. (39 Fed. Reg. 24028, June 28, 1974).

Based on these reasons, the Commission chose to proceed under the CPSA.

On May 7, 1974, the Hobby Industry of America (HIA) petitioned the Commission to exempt model train and car electrical transformers from cautionary labeling requirements of regulations for electrical toys under the FHSA[9/]. HIA submitted extensive documentation, apparently unchallenged by the Commission's staff, indicating that over 90 percent of the users of model trains are adults with an average age of 30 years[10/]. HIA did not directly challenge the Commission's right to regulate model trains under the FHSA. However, it did argue that the trains were designed and intended for use by persons other than children. The Commission denied the petition on the grounds that, notwithstanding the absence of specific injury data, trains and transformers do present a potential risk of electrical shock injury. In the course of denying the petition, the Commission stated:

> The Commission has determined that model car and train electrical transformers are toys or other articles intended for use by children, and thus within the jurisdiction of the Federal Hazardous Substances Act, even if they are also adult hobby items. (See Executive Session Minute, March 13, 1975, and letter to Petitioner, HP 74-15).

9/ 16 C.F.R. § 1505(3)(e).

10/ Survey by Model Railroading magazine, 1969, published 1970, Kalmbach Publishing Co., 1027 N. 7th Street, Milwaukee, Wisconsin. The survey was drawn from a questionnaire inserted

Although the Commission did not detail the reasons for its affirmance of FHSA jurisdiction (the issue was not specifically before the Commission), the fact that the industry specifically advertises to children and often sells its products in toy stores undoubtedly played an important part in its decision.

On July 8, 1975, the Commission issued a MAJORITY OPINION REGARDING REGULATION OF BICYCLES AND TOYS UNDER THE FEDERAL HAZARDOUS SUBSTANCES ACT[11/]. The opinion specifically addressed the question of whether or not the Commission could regulate a product, such as bicycles, which can be used by adults as well as children under the FHSA statutory provision which is designed to regulate articles intended for use by children. A majority of the Commission concluded that it could. The opinion reaffirmed the rationale originally

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in random copies of the magazine. It was designed to assure approximately equal returns from subscribers, hobby shop purchasers, and newsstand purchasers. While it is difficult to know whether the readers of the magazine accurately represent the exact age of model train users, it seems logical to assume a significant degree of correlation.

11/ On prior occasions, the Commission turned down petitions from the Toy Manufacturers of America (TMA) and the Bicycle Manufacturers of America (BMA) requesting regulation under the CPSA rather than the FHSA. In both instances, the Commission noted that the risks of injury associated with those products could be eliminated or sufficiently reduced under the FHSA. See 38 Fed. Reg. 28715 (1973) (toys) and 39 Fed. Reg. 26475 (1974) (bicycles).

expressed in the preamble to the proposed bicycle regulations issued July 10, 1974, that the Commission could include larger bicycles in its FHSA regulations. The preamble, inter alia, stated:

> The Commission is aware that a large percentage of bicycles produced, particularly in recent years, are lightweight, relatively expensive, and sophisticated bicycles which are bought by adults for commuting, touring, and other recreational purposes. However, these same bicycles can be, and are used by children and adolescents. It is clear there is no precise way of distinguishing between those bicycles intended exclusively for adults and those intended for children as well as adults. Neither the manufacturer nor the retailer can accurately predict who the subsequent user will be, nor can the seller predict whether the purchaser will give the bike to a child or share it with a child. Indeed, the bicycle may be purchased exclusively for adult use and when a child in the family becomes physically able to ride it, the use may change. Moreover, an adult purchaser may subsequently sell the bicycle to a parent for a child's use. 39 FR 26105.

Finally, there are the kite and bat cases. In the kite case, the Commission decided that the specific aluminized mylar kites at issue were not "toys or other articles intended for use by children." The majority reasoned as follows:

> While many kites are toys and other articles intended for use by children, and therefore within FHSA jurisdiction, the aluminized mylar kites involved in this matter must be distinguished from kites in general. They

> measure as long as 45 feet[12/], cost $10-15, and appear to be designed for the most skillful kite enthusiasts. An informal telephone survey of some retailers of aluminized mylar kites has revealed that these kites are intended for and most often used by experienced kite fliers who are young adults in their late teens or older. (Executive Session Minute of May 29, 1975.).

The majority did not rest its case for regulating kites under the CPSA on its claim that kites are not articles intended for use by children. The Notices of Enforcement for kites further addressed the issue of choosing between the Acts by stating that even if the kites did come within FHSA coverage, the Commission could make a determination under Section 30(d) of the CPSA that action under the FHSA could not eliminate or sufficiently reduce the risk of injury associated with kites:

> The Commission believes that the metalized kite at issue, though occasionally used or misused by children, are nevertheless not toys or other articles intended for use by children within the meaning of the [FHSA]. In addition, the Commission has determined that the risk of injury associated with metalized polyester film kites cannot be eliminated or reduced to a sufficient extent by action taken under the Federal Hazardous Substances Act. The existing scope and method of public notice which can be required under the Federal Hazardous Substances Act is potentially less effective for these kites than the notice which can be required under the Consumer Product Safety Act. Accordingly, pursuant to Section 30(d) of the Consumer Product Safety Act [citation omitted], the

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12/ While it is true that these kites are marketed as being 45 feet long, in fact, the greatest portion of this length is simply the tail of the kite.

> Commission has determined that any regulatory action in this matter must be undertaken pursuant to the Consumer Product Safety Act. (Notice of Enforcement, November 5, 1975).

In the bat case, the Commission, although it did not detail a 30(d) determination in its Notices of Enforcement, did indicate in an Executive Session Minute that it adapted reasoning similar to that in the kite decision:

> There is some question whether aluminum bats should be regulated under the Consumer Product Safety Act or the Federal Hazardous Substances Act. While the use patterns of the bats in question appear varied the majority believes the great bulk of the bats in question are not "toys or other articles intended for use by children" under the Federal Hazardous Substances Act. Moreover, even if the majority was convinced the bats were within the jurisdiction of the Federal Hazardous Substances Act it would nevertheless vote to proceed under the CPSA because it considers that 1) the issues in this matter can best be resolved through the hearing process prescribed by Congress in Section 15, and 2) the broader notice requirements available in Section 15 of the CPSA are desirable to eliminate or reduce the risk of injury associated with the bats, if it should be determined, after hearing, that the bats create a substantial product hazard. (Executive Session Minute July 28, 1975).

II

While I believe it to be an impossible task to fit the various court and Commission decisions with respect to the parameters of the FHSA's Child Protection and Toy Safety provisions into a completely logical and consistent framework, I do think that certain principles emerge as major dimensions of these decisions. Three, in particular, merit discussion:

a) <u>Intent that a toy or other article be for use by children</u>: As I read the FHSA, Congress did not want to vest

jurisdiction under the Act merely because children use products. More is required. An article must be intended for use by children. Common sense confirms this point. Televisions and refrigerators are certainly used from time to time (if not a majority of the time) by children. Yet I doubt that anyone would seriously argue that these products are "toys or other articles intended for use by children" within the meaning of the FHSA.

The courts have not clarified how one distinguishes between those articles which are and those which are not "intended" for use by children. The Bradley Court, as discussed earlier, states that a party will be considered to "intend" to sell articles to children on the basis of the party's actual intent or on the basis of what is reasonably foreseeable by the party "considering the knowledge, business experience, price, appearance, conduct in the marketplace in regard to these articles and their actual use by the ultimate consumer..." Bradley at pp. 9-10.

While the Bradley Court's analysis is somewhat helpful, I believe it introduces a potent source of error when it refers to the seller's actual intent as a controlling element. Short of the ability to read minds, we can never know a person's actual subjective intent. The only intent that the law should (and does) require is objective intent, i.e., that intent which can be reasonably attributed to a

person based on an observation of the person's expressions and actions. This is consistent with traditional decisions on intent which insist that one be judged on the basis of one's objective, expressed, and not secret, intentions. United States v 681 Cases, More or Less, Containing "Kitchen Klenzer," 63 F. Supp. 286, 287 (E.D. Mo. 1945). See also, Industrial Products Mfg. v Jewett Lumber Co., 185 F. 2d 866 (8th Cir. 1951).

The Jarts Court addresses the question of intent in a very helpful -- albeit indirect -- manner. The Court held that lawn darts are a product intended primarily for use by adults but also for use by children when playing with adults. To the extent that such products are intended for use by children, they may be regulated under the FHSA, according to the Court. Furthermore, as I read the decision, a seller may, to a great extent, demonstrate that his or her product is not intended for use by children: (a) by labeling it "not for use by children" and (b) by not selling it in toy stores or in toy departments of stores. Inferentially, therefore, the greater the extent that one advertises and markets a product for children, the greater the likelihood that the Jarts Court would place the product under FHSA jurisdiction.

I would conclude from this discussion that a rule of interpretation for the FHSA can be stated by a minor extrapolation of the courts' decisions. To determine whether or not a product is a "toy or other article intended for use by

children," one must examine objective indicia that would indicate to a reasonable observer how a person meant to market his or her product. Examples of such indicia are: to whom (or for whose use) and in what manner a product is advertised; which stores, or departments of stores, offer the product for sale; how a product is displayed in a store; whether the product is or is not labeled for use by children; whether the product is labeled as particularly appropriate for certain ages of children; or how the product is packaged. The greater the number of indicia that indicate a product is desirable or appropriate for children's use, the greater the likelihood that it should be regulated under the FHSA.

b) Patterns of use: One might logically assume that if a product is "intended for use by children" within the meaning of the FHSA, it will, in fact, be used by children. The converse proposition is not so clear. As stated earlier, it seems illogical to assume that merely because children use a product, it should fall under FHSA jurisdiction.

One might also argue that the frequency of use by children can distinguish products that are under FHSA jurisdiction from those that are not. That is, if children are not the primary users of a product, it is not covered by the FHSA; if children are the primary users of a product, it is covered by the Act.

This is a mistaken approach. The Commission's decision

on the Hobby Industry of America's petition regarding model trains (where adults comprise the majority of users) indicates that frequency of use by children is not determinative with respect to FHSA jurisdiction. The same conclusion undoubtedly would be reached by the Jarts Court. The Court indicated that the producer intended its product to be used primarily by adults and only secondarily by children. However, to the extent that a clear intent that children use a product can be found, the Jarts decision indicates FHSA jurisdiction will also be found.

This argument has a second side. One might contend that where children are the primary users of a product, it is covered by the FHSA. But this approach also presents difficulties. It would not surprise me if someone were to demonstrate that children use products such as televisions, refrigerators or household stairs more than adults. Absent any proof that these articles are intended -- other than in a very general way -- for use by children according to the approach which I have discussed previously, I would be unwilling to extend FHSA jurisdiction to them.

In addition to the problem of assessing the relevancy of use patterns to the determination of FHSA jurisdiction, there is perhaps the even larger practical problem of discovering actual use patterns for products. The Commission does not have the resources necessary to survey the homes of consumers to determine which age groups do or do not use a

particular product. Furthermore, estimates premised on the notion that purchasers are automatically the users of products can be very misleading. While it is arguably valid to conclude that where children are the primary purchasers of a product, they are also the main users, the converse proposition is manifestly inaccurate. Adults are the only purchasers of items covered under the FHSA such as cribs, baby strollers, or playpens and yet are clearly not the users of these products.

In short, I conclude that use patterns, while relevant, are a secondary consideration in the determination of FHSA jurisdiction. Far more relevant than use patterns, per se, it seems to me, is the producer or seller's knowledge of use patterns. As the Bradley Court (p. 10) suggests, if the producer or seller knows, or should know, that his product is frequently used by children, this knowledge could constitute an important consideration in determining whether or not he intended his product to be used by children. While this knowledge would not necessarily be conclusive evidence in this regard, it would be very important evidence.

c) Injury patterns: Both the Courts and the Commission have considered the injury patterns associated with products to be important in determining whether or not the products are covered under the FHSA. The theory behind emphasizing injury patterns, as expressed by the Bradley Court, is that a

producer's knowledge of injuries to children resulting from the use of his product constitutes an important element in the determination of whether or not the producer intended that children use his or her product. (Bradley at p. 14).

Although not articulating particular reasons for doing so, the Jarts Court and the Commission, in several of its decisions, emphasized injury patterns as the basis for jurisdictional findings with respect to the FHSA.

In my opinion, injury data, perhaps more than purchase data, provide helpful guidance in determining who uses a product. More specifically, injury data help the Commission focus on the risks of injury associated with a product. If a product arguably could be considered an article intended for use by children, the fact that the majority of persons who are injured are children should count heavily in tipping the jurisdictional scales in favor of the FHSA. Of course, the fact that more children than adults are injured by a product does not, standing alone, mean that a product automatically is covered by the FHSA. Children seem to be the exclusive group susceptible to suffocation inside refrigerators. Yet I think it unlikely that anyone would argue that refrigerators should therefore be regulated under the FHSA as toys or other articles intended for use by children. Conversely, the fact that adults are injured in great numbers by a product does not necessarily remove that product from FHSA jurisdiction. Bicycles provide a good

example for this point.

In spite of these qualifications, I believe that injuries are a good means for determining whether or not a manufacturer could foresee, and thus arguably be presumed to intend, that his or her product would be used by children. A manufacturer who steadfastly maintains that a product is intended only for adults in the face of a large number of injuries to children should be required to sustain a significant burden of proof to establish this point.

III

I turn now to a specific discussion of the kite and bat decisions.

Kites:

The Commission's decision that aluminized mylar kites are not articles intended for use by children rests, in large part, upon an informal survey in which, according to the May 29, 1975, Executive Session Minute, some retailers of the kites were asked for whom the kites were intended and responded that the kites are intended for, and most often used by, young persons in their late teens or older.

While I do not question the results of the survey, I think it is important to keep in mind its limited nature. As I understand it, fewer than ten stores were contacted and, of those, only one had ever sold aluminized mylar kites. Further, as stated earlier in this opinion, I believe that one cannot necessarily determine who uses a product based

upon who purchases it.

Even assuming, arguendo, that the primary users of the kites are older teenagers and young adults, one should not blithely conclude that further inquiry is unnecessary. The Commission ignored several factors which I believe to be of overriding importance. First, kites are essentially children's articles[13/]. A manufacturer who markets kites knows or should know that many children will be attracted to his or her product simply by virtue of this fact. If the manufacturer markets a kite that, in the manufacturer's opinion, is unsafe or inappropriate for children, I believe that manufacturer has a duty to place a label on the kite which warns against use by younger people. No such labels were placed. Cf., R. B. Jarts v Richardson, supra.

Moreover, the kite manufacturers specifically sold these kites to toy stores. The very name of one of the kites -- "Little People" -- acts as an inducement for children (or adults for children's use) to buy and use these kites.

Furthermore, a brief check of the incidents reported to the Commission in which aluminized kites became tangled in electric lines and caused a power loss does not include a single instance in which an adult or older teenager was involved. All cases in which the age of the kite flier is

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13/ One should remember that games and sports equipment are the primary types of articles intended by Congress to be covered under the Child Protection and Toy Safety Act. H.R. Rep. 91-389, 91st Cong., 1st Sess. 9 (1969), U.S. Code

known involve young teenagers or pre-teens. Where the age group in which potential injury occurs is one where the FHSA is clearly operative, use of this Act should more seriously have been considered.

Finally, the argument that a determination under Section 30(d) of the CPSA to use the CPSA rather than the FHSA because public notice under the FHSA is "potentially" less effective for these kites than notice under the CPSA, aside from being a post hoc rationalization for an already made decision[14/], is an improper interpretation of Section 30(d). I say this for two reasons.

First, Section 30(d) does not direct the Commission to do a section-by-section comparison of the remedial powers of the CPSA and the FHSA. The fact that the CPSA might, with respect to any given Section, be arguably stronger or perceived as fairer than the FHSA does not, per se, justify the use of this Act rather than the FHSA. Only if action taken under the FHSA could not eliminate or sufficiently reduce a risk of injury is action permissible under the CPSA. No such demonstration has been made by the majority nor do I think one could be sustained under challenge. In fact, it is clear to me that a ban of these kites under the FHSA

Cong. and Admin. News 1909, p. 1236.

14/ The Executive Session Minute of May 29, 1975, does not list better public notice as a reason for using the CPSA. Only in the October 30, 1975, Notices of Enforcement does it emerge.

coupled with the repurchase requirements of this Act would be far more effective in removing the hazards associated with them than the time-consuming adjudicatory process upon which the majority has embarked[15/].

Second, a Section 30(d) determination, while perhaps ultimately a legal decision, cannot be made without certain findings of fact. The Commission cannot justify its decision to use the CPSA solely on the basis of its suspicion that public notice under the FHSA is "potentially" less

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15/ Under Section 3(e) of the FHSA, the Commission may use the informal rulemaking procedures of the Administrative Procedures Act (APA), 5 U.S.C. § 553, to ban a dangerous product. This procedure requires only publication of a proposed ban in the Federal Register and the opportunity for public comment before a ban may be finalized. Under Section 15 of the FHSA, 15 U.S.C. § 1274, manufacturers, distributors and retailers must repurchase all banned products sold by them irrespective of whether the products were banned at the time of sale. In addition, the Commission's repurchase regulations, inter alia, require retailers who have sold banned products to post conspicuous notices in their stores of the articles that have been banned and the procedures for their repurchase. 39 Fed. Reg. 4469 (1974). FHSA procedures can be invoked and implemented very swiftly, often with little cost. In contrast, analogous provisions in Section 15 of the CPSA require full adjudicative hearing, the end result of which, if the Commission is successful, will be an order granting the respondent(s) the election of repairing, repurchasing, or replacing substantially hazardous products. It is unlikely that cases -- other than those of the most minimal complexity -- can be completed in less than one year.

Further, unlike the FHSA which prohibits anyone from manufacturing or selling banned products, the CPSA adjudicative procedures apply only to those companies against whom proceedings are brought. Persons not subject to a CPSA action could continue to sell the dangerous products.

effective than under the CPSA. The Commission, at a minimum, is required to set forth the specific reasons for its conclusion that FHSA public notice is less effective than CPSA public notice and, more importantly, why such a fact, if true, results in the inability of the Commission to eliminate or sufficiently reduce the risk of injury associated with metalized kites under the FHSA[16/].

The net result of the Commission's determination is to emasculate the transferred Acts. If a Section 30(d) determination can be made because the CPSA has greater public notice provisions than the FHSA, it can not only be used to justify abandoning the FHSA in every instance where the FHSA might be used, it can also be used for the same purpose with respect to the Flammable Fabrics Act, which provides no greater public notice authority than the FHSA.

In short, I believe the majority's decision to use the cumbersome and more time-consuming provisions of the CPSA rather than the banning sections of the FHSA is ill-advised and legally indefensible.

Bats:

In at least one respect, I believe that the case for regulating aluminum bats under the FHSA is even more compelling than that for aluminized mylar kites. In the bat case, at least one company, Easton, openly admitted that it

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16/ One might surmise that the majority believes that paid

produces a special line of bats for use by little league players. These smaller, lighter bats are clearly intended for use only by children and would, therefore, seem to be regulable only under the FHSA.

The Commission decision on bats (and to a more limited extent on kites) stands as a complete reversal of its prior decision on bicycles. Instead of regulating bats intended for use by children, which are also used by adults, under the FHSA, the Commission has decided to regulate them all under the CPSA. Neither the logic nor the legality of this approach is very clear to me.

The majority's decision on bats contains a determination under Section 30(d) of the CPSA to use this Act rather than the FHSA because of the broader notice requirements set forth in the CPSA. Again, as with kites, I do not believe this determination to be legally defensible[17/].

The majority advances another reason with respect to bats to justify its use of the CPSA instead of the FHSA.

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advertising can be ordered under Section 15(c)(1) of the CPSA and that this provides the proper justification. However, paid advertising might not be necessary to remove the risk of injury associated with kites from the marketplace under an FHSA ban.

17/ In stating this, I am confining my remarks to the situation where the Commission chooses the adjudicative procedures of Section 15 of the CPSA over the more flexible and effective procedures of the FHSA Child Protection and Toy Safety Act. Other considerations might lead one to a different conclusion with respect to bans under 2(q)(1)(B) of the FHSA. These bans involve adjudicatory hearings that may require years to complete and may not provide remedial authority to sufficiently reduce or eliminate risks of injury associated with many products.

According to the majority, "the issues in this matter can best be resolved through the hearing process prescribed by Congress in Section 15 [of the CPSA]." (Executive Session Minute, July 28, 1975). Although this reason is cryptically stated, I believe it to be the main reason that the majority prefers to use the CPSA in this case and in virtually every other case involving the FHSA's Child Protection and Toy Safety Act. It is my impression that the majority believes that a hearing under Section 15 of the CPSA provides industry with more "due process" than a ban under Section 3(e) of the FHSA. I respectfully submit that this is not a proper basis upon which to support a decision to use the CPSA.

First, such an approach is clearly illegal. The providing of greater "due process" to industry via time-consuming administrative adjudicatory proceedings cannot -- by any stretch of the imagination -- be said to apply to the 30(d) requirement that the CPSA be better able to eliminate or reduce a <u>risk of injury</u> associated with a product. The exact opposite is true. Such proceedings can only add to the public's exposure to dangerous products and increase the risk of injury.

Second, if the majority wishes to provide a hearing to companies charged with producing dangerous products, it is certainly possible to do so under the FHSA. While nothing in this Act requires a hearing, nothing in the Act prohibits it. Such an approach would be completely proper under the law.

IV

Notwithstanding any legal aspects, as a matter of policy, I believe the choice of the CPSA over the FHSA to be ill-advised with respect to the kite and bat cases.

The approach chosen by the Commission is to utilize the procedure set forth in Section 15 of the CPSA which entails a full adjudicative hearing which, as described earlier, can be both cumbersome and time-consuming. During the proceeding, these allegedly dangerous products will remain in the hands of consumers. While I do not question the need for hearings in appropriate cases, the seasonal use of these products should have dictated a more rapid course of action.

In contrast to the CPSA, the FHSA, under Section 3(e) would have permitted the Commission to propose a ban of all of the allegedly hazardous products (not just those produced by those who were named as respondents), take comments and then finalize the ban within a much shorter time frame[18/].

Viewed from a broader perspective, I believe that the Child Protection and Toy Safety Act amendments are superior in many respects to the CPSA. The FHSA, for example, provides in Section 3(e)(2) for administrative banning of a

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18/ Given that the Commission did choose the CPSA, I think that the majority should have considered a Section 8 ban of these products, especially in the case of the kites. I say this because kites constructed completely of aluminized mylar probably cannot be made sufficiently safe by a standard.

dangerous toy in the case where the Commission finds that it presents an imminent hazard to the public health. This procedure protects the public from immediate danger. The CPSA, by contrast, requires the Commission to seek out individual defendants and take them to court to obtain injunctive relief in the event that it believes that it has found an imminent hazard.

Similarly, Section 15 of the FHSA provides for the immediate and automatic requirement of repurchase of banned goods by the industries that produced, distributed, and sold them. The analogous provisions in Section 15 are, as I have discussed, weaker and more time-consuming[19/].

CONCLUSION

In choosing to regulate aluminized mylar kites and aluminum bats under the CPSA, I believe the Commission erred both as a matter of law and of policy.

R. David Pittle
R. David Pittle, Ph.D.
Commissioner

December 22, 1975

19/ It is true that there are no criminal sanctions provided in the FHSA for the repurchase sections of the Act. However, the Commission has available to it the remedy of injunction and individual members within the chain of distribution have private causes of action to compel repurchase. In this case, the desire of a company to be reimbursed for unsalable banned goods should be sufficient to make the section self-enforcing and effective.

APPENDIX K

Correspondence Between Subcommittee and Commission Regarding C .gressional Investigations

Congress of the United States,
House of Representatives,
Subcommittee on Oversight and Investigations,
of the Committee on Interstate and Foreign Commerce,

Washington, March 25, 1976.

Hon. Richard O. Simpson,
Chairman, Consumer Product Safety Commission,
Washington, D.C.

Dear Chairman Simpson: It has recently been brought to the Subcommittee's attention that the Federal Energy Administration (FEA) has adopted written instructions for its personnel which require, in substance, that any discussions with congressional investigators must be pre-cleared by certain officials of the FEA. Any such rules are of concern to this Subcommittee.

Therefore, we request that you advise us whether the Consumer Product Safety Commission has any similar or comparable instructions which govern in any way communications between Commission staff and Members of Congress, Committees or Subcommittees, or the staff of Members or of Committees. We are interested, for example, in any rules which require that such communications be subject to either pre- or post-review by the agency. We wish to know about written rules, guides, or directions (without regard to how they may be characterized) or any practices of the Commission which, though not reduced to writing, are generally understood to apply. In the case of written instructions or rules, please attach a copy of each one.

We would appreciate your reply as promptly as possible.

Sincerely,

John E. Moss,
Chairman, Oversight and
Investigations Subcommittee.

U.S. Consumer Product Safety Commission,
Washington, D.C., April 7, 1976.

Hon. John E. Moss,
Chairman, Subcommittee on Oversight and Investigations, Committee on Interstate and Foreign Commerce, House of Representatives, Washington, D.C.

Dear Mr. Chairman: This letter is in response to your correspondence of March 25, inquiring if the Consumer Product Safety Commission has instructions governing communications between Commission staff and Members of Congress or their staffs or committee staffs.

The Consumer Product Safety Commission has adopted no written policies or instructions similar to those of the Federal Energy Administration which require that its personnel must pre-clear with CPSC officials discussions with congressional investigators. The Commission does not require, either formally or informally, pre-clearance of discussions between its staff and Members of Congress and their staffs or committee staffs. However, the Commission's Meetings Policy (copy enclosed) does require that meetings between Commission personnel and non-Commission personnel be listed on the Public Calendar seven days in advance and open to the public. You will note that this policy provides for specific, limited exceptions.

Our general unwritten policy when a member of the Commission staff is contacted by Members of Congress or their staff or committee staff is as follows:

(a) If the staff member is contacted regarding subject matter in his area of expertise, he is to respond to the inquiry and advise the Office of Congressional Relations (OCR) by phone or memo that the inquiry has been answered.

(b) If a staff member is contacted on a subject that is not in his area of expertise, he is to advise the inquirer that he will have someone return the call. The staff member will advise OCR so that that office can insure that the Members or their staffs are provided with the most appropriate source of information.

(c) All written Congressional inquiries are routinely routed through OCR for coordination of response.

Our Office of Congressional Relations is responsible for coordinating, follow-up, and review of all congressional inquiries in order that Members are properly appraised on matters of policy of the Commission and that they are provided with the most complete response available.

I hope this information will be of assistance.

Sincerely,

RICHARD O. SIMPSON,
Chairman.

[A copy of the Commission's meetings policy has been retained in the subcommittee's files.]

REGULATORY REFORM—NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION (NHTSA)

FRIDAY, FEBRUARY 27, 1976

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS,
COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE,
Washington, D.C.

The subcommittee met at 10 a.m., pursuant to notice, in room 2123, Rayburn House Office Building, Hon. John E. Moss, chairman, presiding.

Mr. Moss. The subcommittee will be in order. Today, the subcommittee moves to the third agency to be studied in its regulatory reform oversight hearings. This morning we will consider the programs of the National Highway Traffic Safety Administration, focusing primarily on NHTSA's program of issuing safety standards for motor vehicles.

The Federal motor vehicle safety standards are at the heart of this Nation's effort to cut back the continuing carnage on our Nation's highways, which still claims over 130 lives and 10,000 injuries each day.

The hearings are designed to explore two basic questions: first, whether the regulatory programs under this subcommittee's jurisdiction, currently in operation, are achieving the goals set forth by Congress; and second, whether additions, deletions, or other revisions to existing regulatory authority are in order.

Proposals to reform the regulatory agencies currently abound in the executive branch, in the Congress, and elsewhere. We recognize that this process of reassessment is critically needed. However, this subcommittee is particularly concerned that we, as a Nation, take care to preserve and to make more effective those regulatory programs which seek to protect the health and safety of our citizens and to reduce environmental hazards.

Efforts—commendable as they may be—to reduce the burden of regulation on business, cannot be allowed to lead to indiscriminate attacks on regulatory programs, especially those producing clear health, safety, and environmental benefits to society. The "surgery" we are directing at Federal regulatory bodies must be performed with extreme care.

Because the motor vehicle safety programs of NHTSA are among those with a high potential for producing a further direct reduction of fatalities and injuries, we must address them with particular emphasis on increasing their effectiveness.

To facilitate the subcommittee's regulatory reform study, I asked NHTSA last summer to reply to a questionnaire. I want to take this occasion to thank NHTSA for its care in responding both to the questionnaire and to our followup inquiries. Today's hearing grows directly out of these previous efforts.

Since the record we are compiling today and through this series will be one of the principal sources from which the subcommittee's regulatory reform report and legislative recommendations will be drawn, the Chair would ask at this time for unanimous consent that the record of hearing remain open for 10 days for supplementary statements by NHTSA and material the subcommittee may request from the agencies or outside experts.

I would also ask for unanimous consent to include relevant staff questionnaire returns, and other documentary material at appropriate places in the record of hearings.

Is there objection?

Hearing none, such will be the order.

In the 10 years since Congress passed the National Traffic and Motor Vehicle Safety Act of 1966, the historically rising highway casualty toll has been reversed. Beginning at the time the vehicle safety program was initiated, the fatality rate has steadily declined from its 1966 high of 5.7 deaths per million miles traveled.

By 1973 this rate had dropped 26 percent to 4.2 deaths per 100 million miles traveled, and after the imposition of the 55-mile-per-hour speed limit, the rate dropped another 17 percent to 3.5 percent.

Had the 1966 rate prevailed over the 10-year period, about 30,000 more fatalities would have occurred, including 20,000 up through the end of 1973. Actual fatalities have fallen from 53,000 in 1966 to 46,000 in 1975.

A substantial portion of these lives saved, and corresponding reduction in injuries can be attributed to the safety improvements in motor vehicles required by NHTSA's safety standards. Thus, NHTSA's program is one of a very few in which a public policy initiative, written into law by the Congress, has brought about a clear turnaround in a mounting public health problem.

But a monumental task remains before us. Translated into dollar terms, the continuing cost to society of automobile death and injury has been estimated to range from as high as $46 billion, to a low of $17 billion annually. Vehicle damage, conservatively estimated, adds at least another $5 billion yearly. Even taking the conservative total of $22 billion, the result is a staggering average of $2,200 in losses per each U.S. automobile during its lifetime.

If this figure represents total benefits achievable by vehicle safety and cost-savings countermeasures, then NHTSA has wide latitude on the cost side in issuing new standards, before the total costs of the standards exceed the total benefits.

In the face of this task, however, NHTSA's production of new safety standards has slowed seriously. Only one new standard was issued in the 2-year period ending in December 1975. This subcommittee acknowledges that NHTSA has entered a phase in its history in which achieving further significant safety gains depends on carrying through with a number of rulemaking actions that will mean greater

impositions on the industry, and will require vastly greater amounts of technical preparation and political courage on the part of NHTSA.

By contrast, most of NHTSA's list of 47 existing motor vehicle safety standards have imposed marginal burdens on the auto companies, and were relatively uncontroversial when issued. We also must acknowledge that the Congress has recently sounded what some may consider to be a cautionary note to NHTSA. However, these factors alone cannot explain NHTSA's loss of momentum.

Therefore, the subcommittee believes it is imperative to raise a number of questions regarding the future of NHTSA's regulatory program. The questions we hope to explore this morning include:

Has NHTSA allowed itself to be put on the defensive by intensified participation in rulemaking over the past 2 years by executive branch units such as the Council on Wage and Price Stability, which has consistently pressed for delays in NHTSA rulemaking?

Has the Agency entered a state which might be termed "paralysis by analysis," holding up rulemaking while seeking to prove the unprovable, and undertaking continuing refinements of benefit-cost studies beyond that required by law?

What is the Agency doing to remedy its lack of a program plan and the deficiencies of its data base, both critical to establishing the safety need and priorities for future proposed standards?

What other factors are impeding NHTSA in its efforts to fulfill congressional mandates?

The issues reflected in these particular concerns also arise in our consideration of other Federal regulatory programs, and thus, our exploration of them this morning has wide significance.

I believe that today's hearing will serve a useful and constructive purpose. For whatever the subcommittee's criticisms or recommendations, we are unified with you in pursuit of a common goal—the substantial reduction in deaths and injuries in automobile crashes.

Dr. Gregory, we are pleased to welcome you here.

I want to note that I express personal regret at learning of your action yesterday afternoon in determining to leave the Agency. I have enjoyed working with you.

I hope that in whatever you do in the future after leaving the Agency you will be successful and find it a very comfortable experience.

Now, at this time, I wonder if you and the members of your panel will stand to be sworn.

TESTIMONY OF JAMES B. GREGORY, Ph. D., ADMINISTRATOR, NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, DEPARTMENT OF TRANSPORTATION; ACCOMPANIED BY ROBERT L. CARTER, ASSOCIATE ADMINISTRATOR, MOTOR VEHICLE PROGRAMS; HOWARD DUGOFF, ASSOCIATE ADMINISTRATOR, PLANNING AND EVALUATION; GENE G. MANNELLA, Ph. D., ASSOCIATE ADMINISTRATOR, RESEARCH AND DEVELOPMENT; AND FRANK BERNDT, ACTING CHIEF COUNSEL

Mr. GREGORY. Thank you, Mr. Chairman, I thank you for those personal comments.

The last 2½ years have been extremely interesting and challenging. I would like to think that the contributions which we have made and in which I have had a small part have indeed made the highways and the vehicles in this country safer.

I think over the years, as I have indicated, the Agency's work has indeed impacted the bottom line. The benefits can be measured monthly as well as annually.

I am grateful particularly for the opportunity to have worked with so many dedicated people, both inside and outside government, who have helped to bring this about. I certainly will have a personal dedication in the future to this particular area.

First of all, if I may, I would like to introduce my colleagues who are with me at the table.

Mr. Moss. Doctor, I think we might do that after this formality. If you will all stand now and be sworn.

Do you and each of you solemnly swear that the testimony you are about to give this subcommittee shall be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. GREGORY. I do.

Mr. CARTER. I do.

Mr. DUGOFF. I do.

Mr. MANNELLA. I do.

Mr. BERNDT. I do.

Mr. Moss. Will you identify yourselves for the hearing record?

Mr. DUGOFF. Howard Dugoff, Associate Administrator for Planning and Evaluation.

Mr. CARTER. Robert Carter, Associate Administrator for Motor Vehicle programs.

Mr. BERNDT. Frank Berndt, Acting Chief Counsel

Mr. MANNELLA. Gene Mannella, Associate Administrator for Research and Development.

Mr. Moss. Now, Doctor, you have a statement for the record. Would you care to have the statement entered in its entirety in the record and proceed to summarize it?

Mr. GREGORY. Yes, if I may, Mr. Chairman. I have a rather lengthy statement. I feel because of the time constraints on both the committee and ourselves in getting ready for other hearings, if it is permissible I would like to have the entire statement entered into the record.

Mr. Moss. Without objection, that will be the order of the committee.

You may proceed to summarize the statement.

Mr. GREGORY. Thank you, Mr. Chairman. I feel you have covered many of the subjects which I covered in my own statement. Indeed, the progress that we have seen in highway safety over the past 10 years has justified the original legislation.

I think when we speak about regulatory reform, we have to look both at the motor vehicle safety standards themselves, their effectiveness, and the process by which they were and will be formulated. I feel that, in view of the intent and the objective of the committee, the philosophy that I have expressed here in my statement, and the results that we have seen in highway safety, will come out in the answers to various questions that the subcommittee may have.

With your indulgence, I would ask that we proceed immediately to the questions.

[Mr. Gregory's prepared statement follows:]

PREPARED STATEMENT OF JAMES B. GREGORY, PH. D., ADMINISTRATOR, NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION

Mr. Chairman and members of the subcommittee, I am pleased to appear before this Subcommittee today to discuss my agency and the issues of regulatory reform.

The mission of the National Highway Traffic Safety Administration is public protection. Our efforts are aimed at (1) reducing the number of motor vehicle accidents, deaths and injuries, and (2) providing economic protection to consumers and to users of motor vehicles and motor vehicle equipment.

The National Traffic and Motor Vehicle Safety Act authorizes us to issue standards improving the safety of new vehicles and to secure the elimination of safety defects in vehicles on the road. In addition, the Vehicle Safety Act provides the authority for such safety related consumer information efforts as the Uniform Tire Quality Grading System and requirements that motor vehicle manufacturers disclose certain safety-related data to prospective purchasers of vehicles.

Under the Highway Safety Act of 1966, we develop uniform standards for State highway safety programs and provide Federal funds to assist the States in administering such programs. These programs focus on developing safer drivers, safer roads and vehicles-in-use.

Finally, the Motor Vehicle Information and Cost Savings Act has required us to undertake action in such marketplace consumer protection areas as automobile damageability, odometer fraud, and the development of information to facilitate comparing the quality of available automobiles.

One way to gauge the progress made in traffic safety is to consider the reduction in the traffic fatality rate, measured typically in the annual number of deaths per 100 million vehicle miles driven.

In 1966, when the national focus on highway safety began, the fatality rate was 5.5–5.6 and rising. By 1973, the rate had dropped over 20% to 4.2–4.3. Using the 1966 figure as an index, traffic deaths could have predicted to be closer to 75,000 in 1973 rather than the 55,000 which actually occurred. That was still, of course, an unacceptable number.

But the fact of the reduction in the fatality rate remains. And it is doubtful that it can be credited to chance.

It is difficult, if not impossible, to sort out and quantify individual portions of the national program which must be given credit for this improved picture. Indeed, no single action or program alone can take credit for the safety gains we have realized. The highway environment was being improved during this period; new motor vehicle safety standards were introduced; and new traffic safety programs in states and communities were being implemented.

Nevertheless, I think it is safe to say that the efforts to improve the technical performance of motor vehicles and motor vehicle equipment are apt to have an earlier effect than efforts aimed at the more difficult task of changing human driving habits. Therefore, among NHTSA's efforts, I think we must credit our motor vehicle safety programs with a majority of the safety gains we achieved through 1973.

But I hasten to add that the implementation of the national 55 mph speed limit in 1974 demonstrated the dramatic benefits to be found in improving driving habits. Proposed originally as a fuel savings measure, the 55 mph speed limit almost immediately began to contribute also to the reduction in highway fatalities. In 1974 and again in 1975, the absolute number of fatalities was more than 9,000 fatalities below the 1973 number. The fatality rate dropped to about 3.6 in 1974. We expect that the final figures for 1975 will show a somewhat lower rate of 3.5 or less because of an increase in miles driven last year compared to 1974.

I must admit that we have no cause to rejoice as long as more than 45,000 Americans are being killed annually on the nation's highways and many thousands more are being injured. However, we can say, based on the record, that the implementation of the Vehicle Safety Act and the Highway Safety Act has had measurable, significant benefits.

Carrying out the intent of the Acts which NHTSA administers has meant regulation in more than one sense of the word. NHTSA directly regulates the safety of vehicles and their components, the principal subject you have asked us to discuss today. But the traffic safety program standards developed under the Highway Safety Act are regulations as well; they form the basis on which State programs are judged to be satisfactory and therefore supportable with Federal funds. Indeed, virtually all government based on laws, rules and procedures can be said to be "regulatory."

The concept of "regulatory reform" needs, in my judgment, more precise definition when we begin seriously to consider and debate the subject. If I may, I would like to relate my discussion of the concept as well as I can to the mission of NHTSA and specifically to the Vehicle Safety Act.

At the outset, we must ask ourselves whether the need for the legislation leading to vehicle safety regulation was at its inception and is today substantial. Then, we must ask whether that type of regulation is still necessary and, if so, whether the approach taken has been appropriate and effective and is likely to be so in the future. In considering these questions, we must discriminate between the substance of regulations and the process by which they are developed.

There seems little question that reducing death and injury on the highway continues to be an acknowledged, worthwhile societal goal. Indeed, the proportions of the problem exceed those of many medical diseases. It was this perception that led to the 1966 legislation which NHTSA administers. The creation of safer vehicles, safer roads and more safety conscious drivers and pedestrians through the force of national legislation and the funding and regulations that flow from that legislation was the objective. Certainly the extent of the problem warranted a national focus not then being given. The intent of the legislation was worthy, and hard working, dedicated people got busy to carry it out. Yet, despite their effectiveness, these programs seem at times to have been among the most controversial in this country since the Stamp Act of 1765.

I do not draw this parallel lightly—nor am I suggesting that safety legislation be withdrawn as was the Stamp Act in 1766. The point is that personal safety of any kind is just that—very personal—and it is subject to the personal interpretation and action of each of our citizens. It is strange but true that unless a person perceives himself in or about to be placed in jeopardy of personal injury or death, safety does not seem to have a high place in his thinking priorities. Training and experience will increase his perception.

I am confident that air travelers wish to be assured of a safe flight, including those travelers most hostile to the idea of wearing safety belts for their protection in their own cars. Few, if any, of the travelers would fault the expenditure of billions of dollars over the years to improve air safety or balk at the costs added to flight fares to ensure their safe arrival. They expect safety; they are in the hands of someone else; and generally speaking, the costs are indirect and relatively unnoticed.

Perhaps it is because being a pedestrian, driver or passenger in highway transportation is such a common experience that an individual's traffic safety awareness suffers. Certainly, these are more personal experiences in which personal decision and action exert a direct influence over safety. Long before the 1966 legislation, there were traffic laws to control many of these actions in the interest of safety. There was an abundance of helpful advice going beyond the statutes, advice which could be embraced or ignored by individuals regarding safe vehicle operation and maintenance, pedestrian practices and the like. Much of the advice called for personal investment in dollars, time, inconvenience or effort.

With some exceptions, essential vehicle safety was pretty much left to individual manufacturer initiative or to industry-wide adoption.

With the 1966 Vehicle Safety Act came requirements for manufacturers to build in standardized safety features. To the extent which costs were added, all car purchasers paid these costs whether they welcomed or were indifferent to improved vehicle safety. Standardized braking, lighting and other accident avoidance measures have been introduced. Interior padding, collapsible steering wheels, more protective windshield glass, safety belts and other features to improve car occupant protection in the event of a crash are found in all of today's new passenger cars and in many other types of vehicles as well. And virtually all of these occupant protection devices, save the occupant restraint system, are "passive," that is, they provide protection without requiring any human action.

So, the car purchaser buys safety protection for himself and others whether he would otherwise choose to do so or not. It is a direct cost, no matter how modest. Probably only to a few persons can this be said to be a truly "popular" purchase. Relatively few of the millions of persons who purchase cars each year will be involved in a serious accident. Fewer still will perceive the money spent for the safety features to have resulted in a benefit, even when the benefit was avoiding death or serious injury. If the occasion does not arise when safety features, like insurance, must perform their intended function, the cost of those features may be thought of as "wasted" by many persons, even by those grateful for protection against the risk of injury. Further, among those persons who have enjoyed the benefit, most cannot quantify the effectiveness, much less the cost-effectiveness of their purchased safety.

Here we must face squarely not only the question of regulation effectiveness and benefit, but also the question of who benefits from regulation. Many laws today require that virtually all citizens pay in some way, generally through tax dollars, but in many cases the benefits of such regulations accrue only to a segment of those who pay. Those who rarely use the Interstate Highway system may be devoting a disproportionate share of their gasoline tax dollars to the system's construction and maintenance of the system which includes by the way, many safety features.

This indirect purchase of safety may not be welcomed, but at least has been largely accepted on the basis, whether fully thought through or not, that overall societal benefits equal or exceed societal costs. These benefits include those which can be expressed in terms of dollars as well as those expresed in the less quantifiable terms of human injury and death.

Again, I must emphasize that the "costs" of safety also go beyond dollars alone, and include inconvenience and expenditures of time and effort. For example, there is a dollar cost for a traffic stop sign, of course, but if the dollar cost of the personal time lost, the gasoline used and the inconvenience experienced in stopping for it during its life time could be quantified, it would undoubtedly far exceed the installation cost. Here I would like to point out as a basis for further discussion that, in stopping at a stop sign, an individual is personally taking an active role in safety as opposed to relying on the passive safety features of the highway or the car which I talked about earlier. And, grudgingly or not, he is paying a price for doing so. Despite this, we can say that stop signs have public acceptability, a factor not to be disregarded in talking about regulatory reform.

I have worked my way into the subject of benefit/cost analysis because it is another aspect of regulation that is being examined and debated today. I think I have already made it clear that safety regulation contains benefit/cost factors in the equation which are very difficult, if not impossible, even to estimate accurately. This difficulty sets safety regulation apart from strictly economic regulation. This is not to say that, when a safety regulation is proposed, as good a job as possible should not be done to predict the benefits and assess the costs. I think that such a job should be done as early as possible and that NHTSA made good sense strides toward that goal long before the present debate. Nevertheless, we cannot ignore the consensus I see among the public, the Administration and the Congress for even more precise and persuasive information as a basis for regulation of all types. This, by the way, includes not only prospective regulation but, past requirements as well—a post-audit, if you will, of regulatory practice. Good solid answers to tough questions must be provided if the credibility and integrity of regulatory programs are to survive, despite the worthiness of objectives. Safety regultion is embattled along with other types of regulation, whether we wish it so or not. And it will survive ultimately on public understanding of problems and acceptance of practical solutions.

Again, perhaps the problem is perceived and accepted all right, but the solutions are not. In either case, we in government must share the blame if we have not communicated well or have sought unacceptable solutions.

I seriously doubt that many individuals know or care about the societal benefit/cost ratio of their automobile's safety features. Nor do many take pains to analyze the increased costs that are placed on them as a result of other people's accidents in terms of emergency services provided, community-sponsored hospitalization, increased insurance rates, and the like. Yet these costs are real, even though they are not direct. We still have a lot of informing to do, it seems to me.

Even so, the informed person may legitimately choose an alternative to mandated safety action on philosophical grounds as we have recently seen in the case of the motorcycle helmet question in the Congress. Here the facts were known; the savings in lives and the societal costs were identified. We must view the action to date as a signal from the public on how far safety regulation may be extended to require personal action.

The issue of requiring personal action previously arose under the Vehicle Safety Act during my tenure in the case of the safety belt ignition interlock. It would be easy for me to file a disclaimer on this subject, since the requirement came into being before I assumed the Administrator's job, but I shall not do so. Nor do I pretend to claim that all the belt and interlock systems were well designed by the manufacturers to facilitate easy use by car drivers and passengers. The fact is that the interlock was largely a safety success. People buckled up in increasing numbers beginning with the 1974 models which contained this "ultimate reminder." Even as all the unhappy shouts against the interlock finally abated we were seeing over twice the average lap belt wearing in these cars and upwards of 8 times the normal shoulder belt usage. Lives were indeed being saved and injuries were indeed being reduced among about 10% of the total car occupant population by the fall of 1974. We conclude that it was primarily expressed unpopularity which prompted Congress to do away with the interlock in favor of a less strident reminder. It was another signal regarding the lengths to which personal action can be required to promote safety. Yet the answer might have been different had all those working on this idea—government, industry and the public—communicated better in advance and had provided better designs. The interlock experience was perhaps as much a failure of this aspect of the regulatory process as it was the idea of interlock itself or its implementation.

On the other hand, I think the struggle to maintain the integrity of MVSS 121, the truck air brake standard, might have taken on a different character had the public been truly involved. In many ways, the air brake standard could be said to be more like the air safety standards I mentioned earlier. There is hardly a car driver who has not felt misgivings a time or two when sharing the road with a large articulated vehicle which outweighs his car by some 15–20 times and over which he has no control. And there are probably few who have not been further concerned over the potential hazards in a stopping emergency, particularly when such a vehicle is behind them. To all these people, the idea of better truck brakes and the avoidance of fishtailing and jackknifing should basically have merit. As in the case of the air traveler, the safety is built in for his protection with the costs being basically indirect. Yet the public has seemed largely uninterested even with the recent news and editorials which have drawn attention to the subject. This too is a signal for better communication and public involvement early in the regulatory process, all technical merits of the regulation aside. I cannot leave this subject without saying that, based on my Congressional mail, the perception of MVSS 121 has largely been negative, although in recent days I am happy to report a more understanding and supportive tone.

As I have indicated, problems in the regulatory process for the NHTSA come from a variety of sources. However, many of these problems grow out of the fact that the automobile is an integral part of the economic and social fabric of the Nation. We at the NHTSA frequently find ourselves faced with a number of legitimate societal and legal interests that are inconsistent and competitive with one another. One problem involves the technological complexities of our programs. Injury causing accidents are extremely complicated affairs, and our data concerning the pre-crash, crash, and post-crash environments is not as complete as we would wish. There is an unavoidable subjectivity in the determination of the cause of an accident or injury by an after-the-fact investigator. Furthermore, accidents and injuries typically involve several causes, in varying degrees, which cannot be easily factored out for purposes of devising programs which can with precision predictably eliminate, or at least mitigate, such causes. I also must say that our crash data has not been limited solely by the state-of-the-art of data collection. The NHTSA has requested without success appropriations to purchase and install crash recorders in automobiles. These devices would add substantially to our ability to determine the dynamics of an injury or death producing accident, and would thereby aid our efforts to issue motor vehicle safety standards tailored precisely to meet the need for motor vehicle safety.

Establishing cost and leadtime estimates for safety standards has been difficult. The industry is the major source of information regarding the costs of safety regulation. We often receive cost estimates for a safety feature computed on the basis of the added-on equipment that would be used in the first years of compliance rather than on the basis of the designed-in equipment that would be subsequently used. Since added-on equipment is more expensive than designed-in equipment, the estimates tend to be somewhat inflated. Another factor leading to inflated estimates is the practice of expensing engineering and design costs and amortizing, over a short time, tooling costs. In addition, the industry's comments on the total costs for safety equipment that was installed in cars prior to any Federal standards or that in some instances might well have been adopted in some form by the manufacturers in the absence of standards.

There are legal and procedural requirements with which we must comply in our regulatory activities which unavoidably slow down the administrative process. However, I do not regard these requirements as "impediments." As I have indicated earlier, the safety regulation of automobiles and drivers of automobiles has an effect on other societal interests of importance comparable with motor vehicle safety, particularly the economy, energy, and the environment. I firmly believe that the time taken for a full consideration of the views received in our notice and comment rule making procedures, is necessary for a responsible administrative decision which is likely to have far reaching consequences.

In summary, the major problems which the NHTSA faces are substantive rather than procedural. More often than not, it is the increasing complexity of our problem solving that governs our schedule. Motor vehicle safety is not a problem area for which it is always reasonable to expect quick and cost-free solutions. It is also important to remember that our basic safety programs are in operation and are working. We have reached a much higher level of sophistication in motor vehicle safety than existed at the program's inception. I think the controversy arising around the safety program has grown in direct proportion with the difficulty of achievement. In the early days, adoption of standard practice was palatable to the regulated industry in the case of motor vehicles and to the States in the case of traffic safety standards. New ideas, new hardware, new approaches are always hard to sell because they disturb plans largely based on the status quo or which are aimed at objectives other than those of the regulation. We have had to make tough decisions, and the job ahead is even more complicated as we consider major changes in the interest of vehicle occupant safety.

The lingering, most important issue today is the improvement of MVSS 208, the Occupant Restraint Standard.

I mentioned that in 1974 and again in 1975 traffic fatalities dropped by more than 9,000 as compared to 1973. In my view, only one other step in highway safety can be expected to produce an additional decrease of that magniture within predictable time: either greatly increased use of present and improving "active" safety belt system, or provision for so-called "passive" restraints.

Somehow the whole subject of "passive restraint" has become confused. Passive restraint systems have been equated by some persons with air cushion restraint systems, commonly referred to as the "air bag." This equation is not correct, and I want to take this opportunity to set a few things straight publicly.

First, there are many passive protective features in cars already as I briefly mentioned earlier in my statement. The interior padding, collapsible steering wheel, the head restraint, and the windshield glass are passive and, if you will, so is the absence of many protruding handles and knobs that formerly injured people in cars of bygone years. All these features are passive and protective, as are the side door guard beam and the other collapse characteristics of the car's structure. Proponents and critics will differ on their quantitative assessment of these features' effectiveness, but the features reduce the severity of injuries and help avoid fatalities under a wide variety of common crash conditions. The idea of a "passive" restraint merely carries this type of protection one step further.

Second, the "air bag" need not be the only answer. For many future smaller cars, the three point belt could be replaced by soft or collapsible knee bolsters below the dashboard for lower torso protection and a simple, comfortable shoulder belt that is automatically placed around and restrains a person's upper torso in the event of a crash.

Third, reduction of car weight is the single most effective measure to improve automobile fuel efficiency, although improved technology in carburetion, ignition, and power transmission undoubtedly will play a part. Even given the continued salutary effects of reduced speeds, the laws of physics dictate that occupants of lighter cars come off less well in a given crash than they would if surrounded by the greater energy absorption potential of heavier vehicles. The chances of a person's being in a smaller car are rising and the chances of a small car's being in a crash with a larger vehicle will remain high for sometime. Even after the fleet is "converted" and smaller cars are the rule, the potential for injury and death will still be greater than in today's world.

With this in mind, NHTSA is digesting the voluminous series of docket submissions and reports from all sides which were received in our hearings of last May. We are being as careful as possible in reaching our decisions. We must be, because of the controversial nature of the issue. Moreover, we must be mindful that the Congress has reserved the right to pass on our final judgment in this matter. My goal is to have a final rule published before the traditional August recess this year.

If the Committee would like, I am prepared to discuss after my statement our most recent analysis and indicate the set of options we can consider.

Although I thought it extremely important to express some of the basic difficulties in improving motor vehicle safety, I do not want to leave the Subcommittee with the impression that we have been overwhelmed by the difficulty of our task. Not only would such an impression be inaccurate, but it would be unfair to many people in the NHTSA whose talents and energies have resulted in substantial safety gains since 1966. We have been saving lives, as the record shows. Indeed, NHTSA is one of the few agencies which can point to a measurable "bottom line" impact, month to month, year to year.

As you know, motor vehicle safety standards are issued and modified pursuant to the informal rule making provisions of the Administrative Procedure Act. These procedures maximize participation in the rulemaking process by persons outside the NHTSA, whether from a member of an industry which may be affected by a standard, or from a person or organization representing the purely "safety interest," or by a governmental entity or member of Congress. Such persons have an opportunity to submit their views and to consider and respond to the views of others.

As a practical matter, most of the comments received in the course of a rule making are from industry members or associations. The interest of such organizations is usually direct and economic, and induces them to expend the resources necessary to participate in an effective way. However, it must be remembered that not all commercial concerns come out the same way on safety issues. The insurance industry and manufacturers of safety components have contributed useful information in support of what is usually called the "consumer interest."

Nevertheless, it is true that consumer groups participate less in our rule making than industry and certainly less than we would like. This imbalance in the quality of participation creates a problem for the NHTSA—we seem to be variously criticized as adversaries of the industry, or as its advocates. But more important, the imbalance in participation deprives the NHTSA of useful input in the rule making process as I have already indicated.

The problem of increasing the quality of consumer participation is not an easy one to solve. Effective participation in a complex rule making proceeding requires substantial skill and education in the safety area. Thus, merely increasing the publicity of rule making activity, while perhaps stimulating some participation, would not necessarily lead to the quality of participation that we need.

There does seem to be a natural selection process at work. Although participation in rule making is not great when viewed across the board, certain issues, especially those involving children, do arouse considerable useful consumer input. Thus, it seems that the level of consumer participation is related to consumer interest, and consumer interest in safety varies with particular issues. If so, the best approach may still be the one which we presently employ, that is, to ensure easy access to the decision-making process and consider all comments received. I have already mentioned the critical factor of basic communication.

A safety standard program is not worth much unless there is an adequate enforcement effort to ensure compliance in the industry. We have emphasized an agressive enforcement posture.

Our standards enforcement is done through compliance testing of motor vehicles by independent test laboratories. Although I am submitting a detailed description of the scope and depth of our compliance testing program as part of my written statement, let me say in passing that in 1974, we tested a total of 253 vehicles, including 210 passenger models, 19 trucks, 6 multipurpose vehicles, and 18 buses. We also tested approximately 5,112 items of motor vehicle equipment, including 1,089 tires and 1,995 seat belt assemblies.

The other aspect of our enforcement effort is our Defects Investigation program. This program is designed to deal with safety related problems that are not covered by a particular standard, by identifying safety related defects in motor vehicles and requiring the manufacturers of such vehicles to recall and remedy those vehicles at no cost to the vehicle owner. The defects investigation program relies in large part on consumer complaints. Public participation in this area has been excellent—we receive about 1,500 letters a month. Further, our Auto Safety Hotline Pilot Project, where consumers may telephone complaints about their automobiles had added to the volume of consumer input in the defects area. I might add that our Office of Defects Investigation does not play a passive role in detecting defects. We have, for example, conducted surveys of recreational vehicles which have unearthed several safety problems which have been the subject of investigations. We have conducted a school bus survey and are presently analyzing the data to determine whether defect trends exist. We have also been conducting monitoring of manufacturer recall campaigns to ensure that manufacturers have been conducting these campaigns properly.

In summary, Mr. Chairman, NHTSA's programs have been effective despite impediments and problems we face involving human nature, public acceptance of regulation, technological complexities, and procedural requirements. The prospects for the future are good, but better results will not come easily. As much rests on communication and public involvement as on improved technology and sheer rulemaking. Frankly, I fear ill-advised or irresponsible rhetoric, whatever the position taken on issues, far more than I do any potential inability to identify and continue to solve the problems of motor vehicle and traffic safety.

Now, Mr. Chairman, we welcome any questions you may have.

[Attachments to Mr. Gregory's statement follow:]

NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION—ALLOCATION OF AGENCY MONEY BY FUNCTION IN THE LAST THREE FISCAL YEARS; JANUARY 19, 1976

(in thousands)

	1975 actual	1976 estimate	1977 estimate
Traffic and motor vehicle programs	$35,090	$38,320	$44,185
Motor vehicle consumer information	7,674	950	995
Highway safety research and development	28,110	29,184	28,800
Subtotal	70,874	68,454	73,980
State and community highway safety	86,076	105,000	103,000
Grand total	156,950	173,454	176,980

ALLOCATION OF AGENCY PERSONNEL BY FUNCTION IN THE LAST THREE FISCAL YEARS

	1975	1976	1977
Motor vehicle program	225	197	202
Traffic safety program	124	134	134
Research and analysis	166	183	180
Motor vehicle consumer information	33	30	25
General administration	217	221	221
Program direction and coordination	(93)	(97)	(97)
Staff and administrative support	(124)	(124)	(124)
Subtotal	765	765	762
Regional offices	116	116	116
Grand total	881	881	878

SUMMARY OF DEFECT RECALL CAMPAIGNS

Year	Defect campaigns		Vehicles recalled (thousands)		Defect recall campaigns [1]
	Domestic	Foreign	Domestic	Foreign	
1969	138	42	7,502	416	4.4
1970	100	54	738	502	5.3
1971	182	53	8,790	630	9.7
1972	277	43	7,814	4,263	14.9
1973	208	43	6,667	334	14.3
1974	208	39	2,338	531	14.9
1975	190	27	1,931	280	14.3

[1] Directly influenced by NHTSA (accumulative percent since 1966).

NHTSA SAFETY STANDARD-COMPLIANCE - TOTAL TEST PROGRAM

TESTED TO A VEHICLE REQUIREMENT OR AS A COMPONENT OR EQUIPMENT

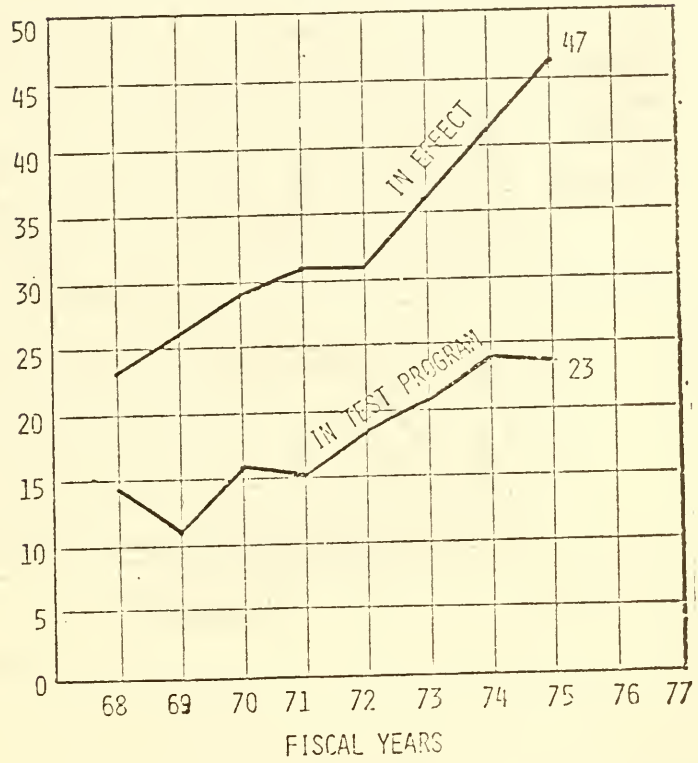
		CALENDER YEARS									
		1968/9	1970	1971	1972	1973	1974	1975	1976	1977	1978
VEH. REQ.	FAILURES	30	35	18	14	7	34	21			
	VEH. TESTS	274	147	164	144	160	315	242			
	% FAILED	10.9%	23.8%	11.0%	9.7%	4.4%	10.8%	8.7%			
EQUIP REQ.	FAILURES	749	502	579	346	103	409	121			
	EQUIP. TESTS	7442	8059	13024	7889	6255	4078	3430			
	% FAILED	10.1%	6.2%	4.4%	4.3%	1.6%	10.0%	3.5%			
TOTAL	FAILURES	779	537	597	360	109	443	152			
	TESTS CONDUCTED	7716	8199	13188	8133	6425	4394	3672			
	% FAILED	10.1%	6.6%	4.5%	4.4%	1.7%	10.1%	4.1%			

December 31, 1975

NHTSA COMPLIANCE TEST PROGRAM

NUMBER OF STANDARDS AGAINST WHICH VEHICLES AND EQUIPMENT ARE BEING TESTED

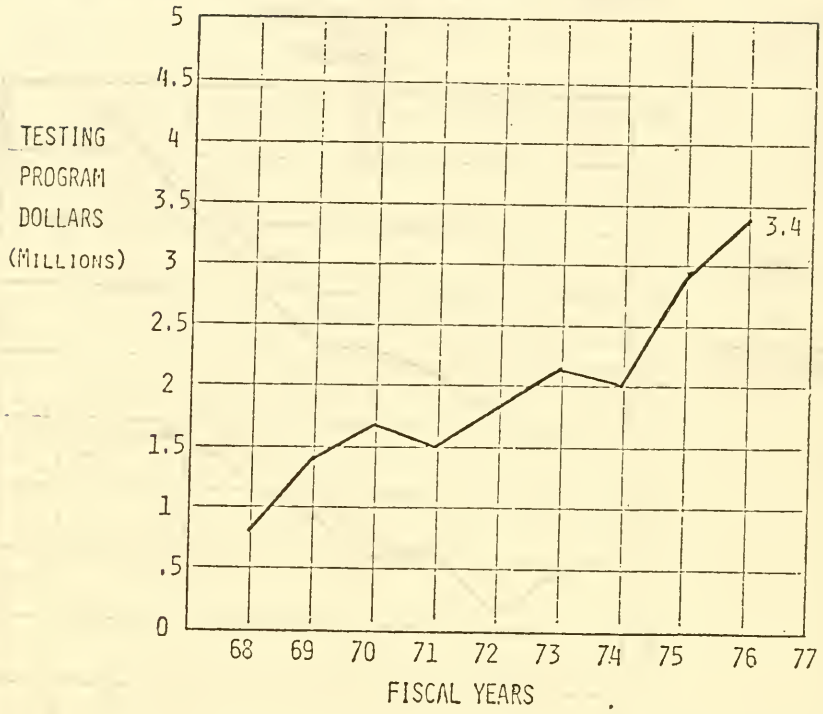
1968-1975



December 31, 1975

NHTSA COMPLIANCE TESTING BUDGET

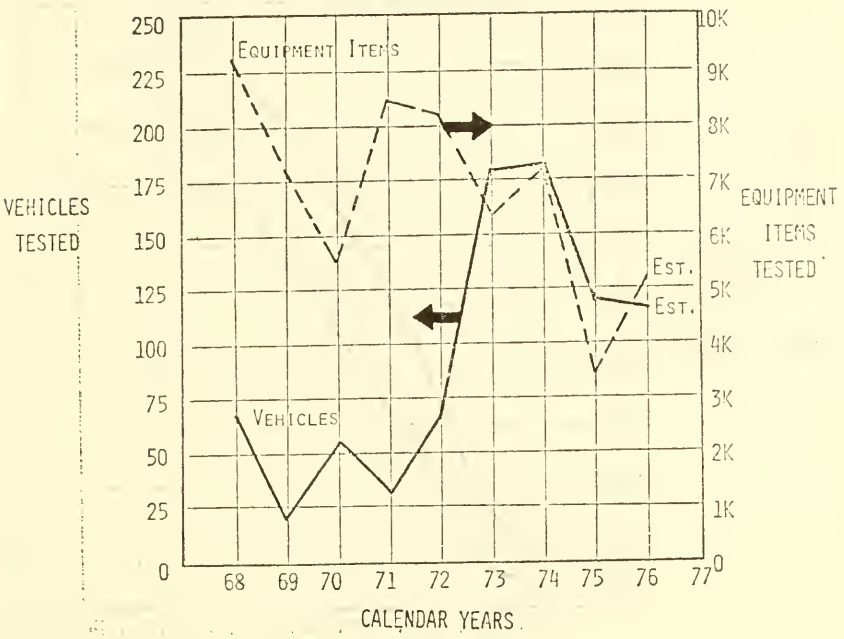
1968-1975



December 31, 1975

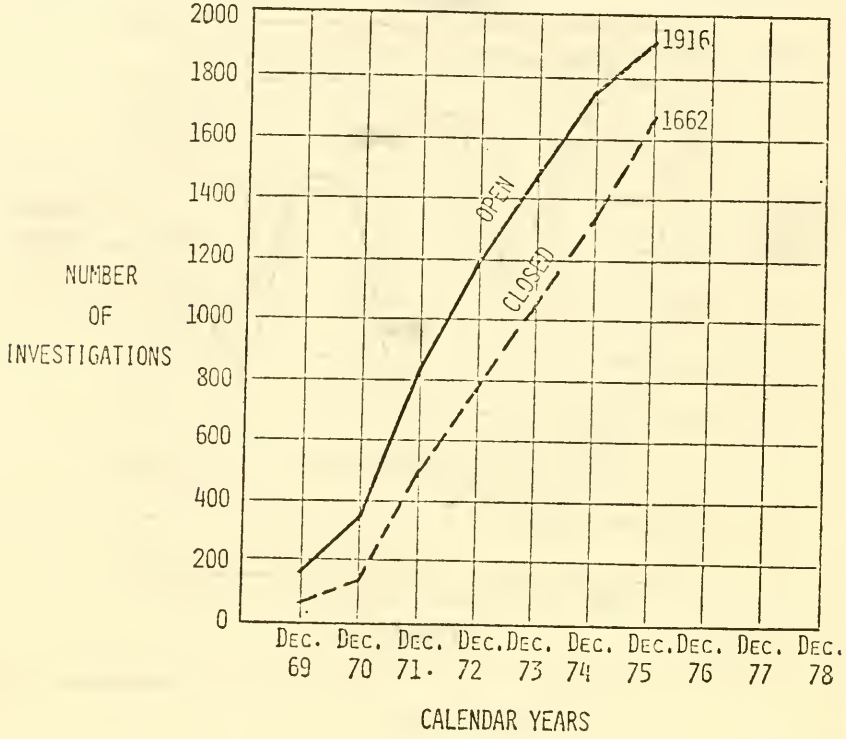
NHTSA COMPLIANCE TEST PROGRAM: ITEMS TESTED

1968-1976



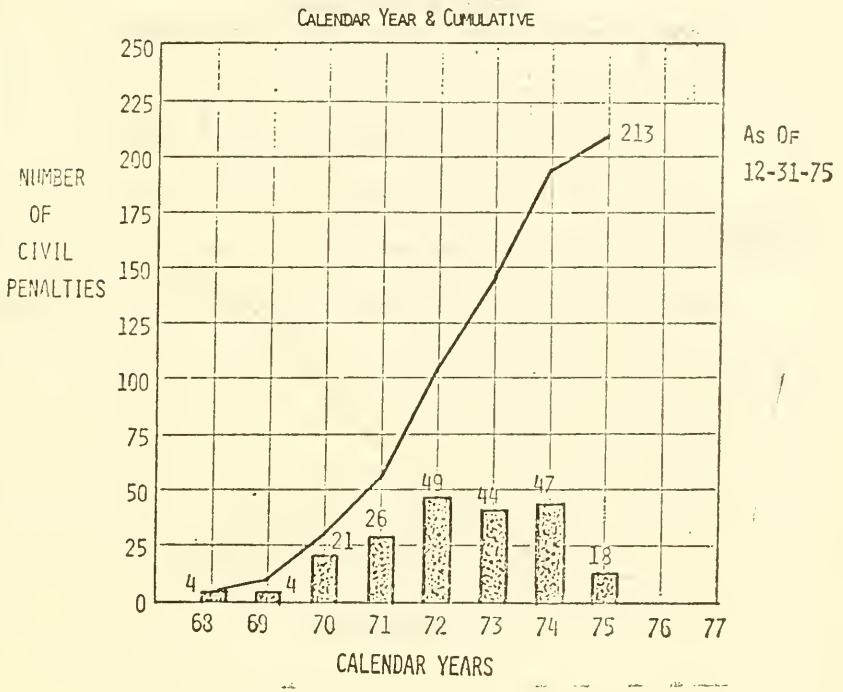
December 31, 1975

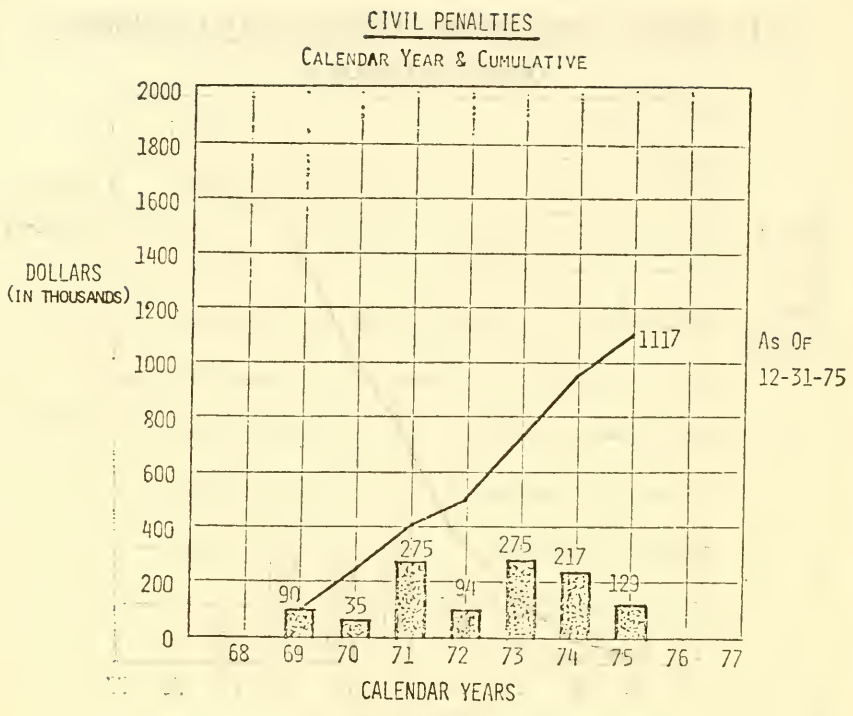
NHTSA OFFICE OF STANDARDS ENFORCEMENT INVESTIGATIONS



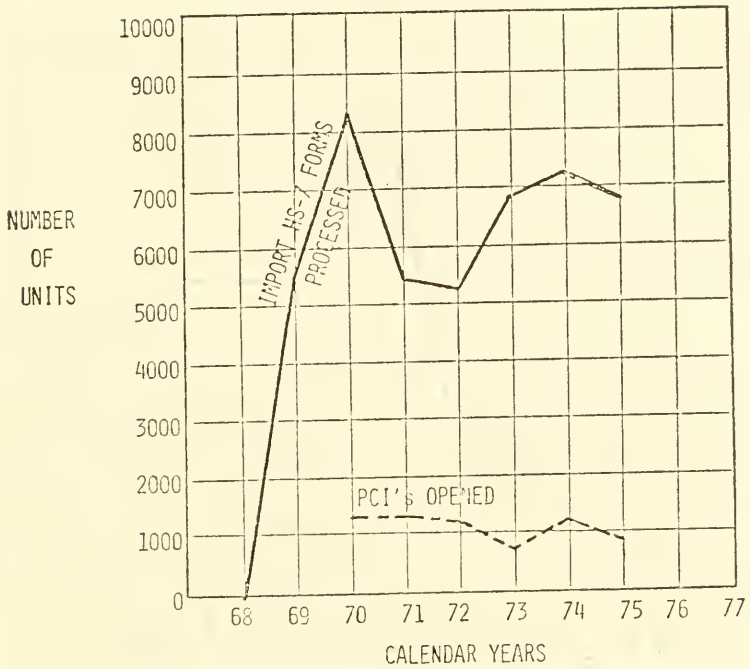
December 31, 1975

CIVIL PENALTIES FOR NONCOMPLIANCE WITH NHTSA STANDARDS




CIVIL PENALTIES
CALENDAR YEAR & CUMULATIVE
DOLLARS
(IN THOUSANDS)
2000
1800
1600
1400
1200
1000
800
600
400
200
0
90
35
275
94
275
217
129
1117
As Of
12-31-75
68
69
70
71
72
73
74
75
76
77
CALENDAR YEARS

MOTOR VEHICLE IMPORT INFORMATION

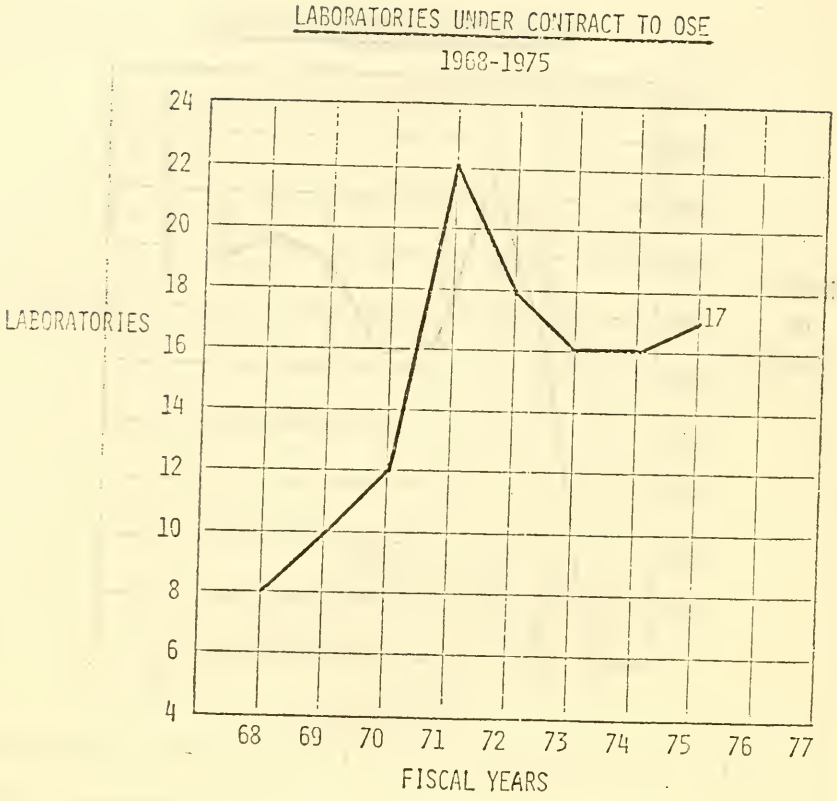


*PCI - Preliminary Customs Investigation (Result Of HS-7 Processing)

December 31, 1975

Laboratories Under Contract to OSE 1975

1. Agbabian Associates
2. Approved Engineering Test Labs.
3. Ball Brothers Research Corp.
4. Compliance Testing Inc.
5. Dayton T. Brown, Inc.
6. Detroit Testing Laboratory
7. Dynamic Science Div. of Ultrasystems
8. Electrical Testing Laboratories
9. General Environments Corp.
10. Hauser Laboratory
11. Industrial Testing Laboratories
12. North American Testing Co.
13. Smithers Scientific Services
14. Southwest Research Institute
15. Standard Testing Laboratories
16. United States Testing Inc.
17. Virginia Polytechnic Institute



December 31, 1975

Mr. Moss. Fine. Mr. Dodge.

GREGORY RESIGNATION

Mr. DODGE. Thank you, Mr. Chairman.

Dr. Gregory, we learned late yesterday, quite to our surprise, of your decision to resign from your post as Administrator of NHTSA. We understand that the President has asked that you stay on as Administrator until your successor takes office.

[Letter of resignation and President Ford's acceptance follow:]

U.S. DEPARTMENT OF TRANSPORTATION,
NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION,
Washington, D.C., February 23, 1976.

THE PRESIDENT,
The White House,
Washington, D.C.

DEAR MR. PRESIDENT: I wish to submit my resignation as Administrator, National Highway Traffic Safety Administration, Department of Transportation, to be effective at your pleasure.

The more than two and one-half years during which I have had the honor to serve as NHTSA Administrator have been challenging and eventful. National programs to reduce death and injury on our streets and highways have continued to have a significant impact. In addition, dramatic reductions have occurred as a result of lower speeds during the last two years. State and community emphasis given to the traffic safety problem has also played a large role.

I have been privileged to participate in these programs along with many dedicated people, both in and outside government, who are actively working for greater safety. For this I shall be forever grateful.

I am grateful also for your support and that of Secretary Coleman, former Secretary Brinegar and Deputy Secretary Barnum, without which the progress we have witnessed could not have been realized.

Respectfully,

JAMES B. GREGORY,
Administrator,
National Highway Traffic Safety Administrator.

THE WHITE HOUSE,
Washington, February 26, 1976.

HON. JAMES B. GREGORY,
Administrator, National Highway Traffic Safety Administration, Washington, D.C.

DEAR JIM: I have your letter of February 23, and it is with sincere regret that I accept your resignation as Administrator of the National Highway Traffic Safety Administration, effective upon the appointment and qualification of your successor.

Throughout your tenure as NHTSA Administrator, you have fulfilled your difficult and challenging responsibilities with skill, integrity and dedication. You have brought objectivity and a high sense of purpose both to the process of decision making and to the professional management of the agency. Under your direction and leadership, new and effective programs of highway safety have contributed significantly to a reduction in the Nation's traffic fatalities and injuries. Yours is a record of achievement in which you can truly take great pride, and I welcome this opportunity to express my personal gratitude for your service.

Now, as you prepare to return to private life, I want you to know that you take with you my warmest good wishes for every continued success and happiness in the years ahead.

Sincerely,

JERRY FORD.

Mr. DODGE. A resignation such as yours which comes unexpectedly inevitably raises questions as to why. We wonder whether you can

share with the subcommittee the factors that figured into your decision to resign.

Mr. GREGORY. Mr. Dodge, my resignation was strictly a voluntary and personal decision, one which I came to sometime around the 1st of the year. I indicated my feelings to Secretary Coleman and he was generous enough to insist that I think it over. I felt that I owed him that additional thought.

But in the end, I feel that eventually a person must ask himself whether he has fulfilled the commitment he has made to himself when he takes a job.

Again, all factors considered, it was a strictly personal and voluntary decision. I hope to lay any questions to rest by making that statement.

I was not asked to resign. I was not fired. There are no hidden meanings in all of this. I am grateful that I have the chance to set that record straight today.

Mr. DODGE. Granting that it was a personal decision on your part, we are curious to know whether any of the particular frustrations of completing NHTSA's rulemaking on the passive restraints in any way were a factor in your decision?

Mr. GREGORY. No, not at all. As a matter of fact, I really feel that the regulatory process is going very well in that area. I have been able to work very well with the Secretary in keeping him up to date on the data as it comes in and on our analyses of the data.

I would like to go on the record as saying that Secretary Coleman's position with regard to NHTSA is one of keeping NHTSA an independent agency, independent of outside influences. He has expressed this view to me on numerous occasions.

For some instances where there is a great impact both on benefits and costs, I do inform him of the analyses and thoughts going in regard to those issues. On important issues, I believe he deserves this and am sure he expects it.

So, as far as any specific frustrations relating to Federal Motor Vehicle Standard No. 208 are concerned, I categorically deny there was any connection with my resignation.

I think you have a combination of factors in any regulatory job—I guess it might be described as a minefield—there are pressures all the time. No one can leave a job without unresolved issues.

Naturally there are always questions as to whether any specific thing occurred to necessitate a resignation. I guess what I am saying is that when you add up 2½ years of service, any words you want to use, whether it is frustrations or energy spent or something else, you get up one morning and you are worn enough at that point that you say, "With all these factors that I have been thinking about, I think maybe it is a good time to lay this career to rest."

I do so in the confidence that we have attacked many difficulties over the past 2½ years that I have had the honor to be associated with NHTSA.

Mr. DODGE. You leave us with some sense though that you have experienced some general frustrations on the job. Is that the case?

Mr. GREGORY. Not anything that I didn't expect when I got here. As regulators, and particularly I think in this field that affects so

many people directly, you have a tendency to be criticized by the majority on almost any decision you make.

I have said many times in interviews that in a regulating area such as ours, there is no 51 percent majority. As a matter of fact, if I get 12½ percent I consider it a landslide.

I believe that, far from being a frustration, that circumstance allows me to be as objective as possible because if I know that the majority is going to find some criticism of my decisions, I am allowed to be as objective as possible in making it.

Mr. Dodge. One of the decisions which has been relatively controversial is the one to go forward with the airbrake standard for heavy trucks. The trucking industry, or at least some elements of it, are among those who have been consistently predicting your resignation.

I wonder if the controversy which has surrounded this rulemaking action and your decision to stick to your guns on it has in any way contributed to the abbreviated nature of your tenure?

Mr. Gregory. I doubt that I would resign because of something that I am rather proud of.

Mr. Dodge. Can we expect over the next few months that you will hold fast to the agency's current position to keep the 121 as it applies to trucks essentially in force?

Mr. Gregory. I think you will find that in today's Federal Register or certainly next Monday's the final rule on 121 was issued. I signed it in the past day or so.

Mr. Dodge. Thank you.

You were confirmed by the Senate on August 8, 1973, and you submitted your resignation I gather this past Monday. Your brief term of 2½ years as Administrator conforms roughly ot those of your predecessors and suggests a short life expectancy for NHTSA administrators.

For our regulatory reform study, and I don't mean this question facetiously, can you propose any ways in which regulatory agencies and, particularly the post of agency head, might be made more hospitable so that capable persons who are attracted to posts such as yours will choose to stay longer after they have learned the ropes?

Mr. Gregory. I really don't have any suggestions on that. If 2½ years is average, then you can call me average. In this realm of pressure, I guess you have to multiply time times pressure and somehow get a total effect on the individual.

I really have no comment on that except that I think the administrator, who comes in when all the big issues have been solved, would have a delightful time. I think in this area anyone dedicated to reducing something as important as injuries and deaths, and who starts programs and guides programs in anything so serious, is bound to face the type of pressure that someone deciding other types of questions may not have.

You must remember that the constituency on safety is broadly scattered. The Congress is interested. It has mandated. The industry is interested. It is regulated. There are public interest groups who have specific types of interests, indeed at times rather narrow interests, which they are asserting.

You have the broad-based public sector in safety which don't necessarily establish the same priorities for programs as you might as head of NHTSA.

Then you have the public's perception of what you are trying to do. I think that we all know, and I have said this many times, but I will repeat it here before this committee, that in the thinking priorities of the average citizen, traffic safety per se is probably about as exciting as a bad haircut.

Communication of what you are trying to do, an identification of a problem, and communication and involvement of the public on separate solutions are some of the most important things that can be done in our programs.

Here in Washington, we talk about benefit-cost analysis, and we talk about great programs, but the average person does not weigh the benefit-cost analysis of anything that he buys. He will purchase safety because it is required that safety is sold.

Even the grateful who escape serious injury or reduce the chances of death in a given situation may look on the purchase of safety equipment as a wasted thing.

There is a great philosophical argument that can be made on all sides of this safety question.

SAFETY STANDARDS

Mr. Dodge. Given the mandate of the Congress as reflected in the 1966 Act, you will agree that at least for the time being that NHTSA's prime duty is to move forward with the vehicle safety program in its best judgment?

Mr. Gregory. That is right. I think we have to recognize that in the establishment of vehicle safety. The chairman's statement was entirely correct. As you move ahead from the more or less standard practice that may have been in effect in the automobile industry regarding safety in the early days toward the more complex, yet effective ideas, you must use a much higher degree of analysis.

You also get a much higher degree of resistance. The communication with the public and increasing their safety awareness, becomes more difficult.

So you are indeed climbing up a mountain in many ways in this complexity while you are trying to get down the curve of effectiveness and approach some level of what we alleged scientists sometimes call an asymptotic level.

Mr. Dodge. With respect to these increasing difficulties and acknowledging that they are reflected in a slowdown in the issuance of new standards, I would, Mr. Chairman, at this point like to request that there be introduced in the record a chart which shows the chronology of the number of new rules issued in differing time periods since the beginning of the safety standards program.

Mr. Moss. Under the previously granted unanimous consent that will be placed in the record.

[The document referred to follows:]

NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION—ISSUANCE OF NEW RULES,[1] 1966-75

	New vehicle standards	New manufacturer regulations	Cumulative total rules issued
Year:			
1966-69	[2] 29	2	31
1970	5	1	37
1971	4	4	45
1972	6	0	51
1973	2	5	58
1974	0	1	59
1975	1	3	63
Total	47	16	63

[1] Does not include amendments to existing standards—some of which are significant, some of which weaken the standard, and most of which are minor.
[2] Many of the 1966-69 standards were enactments of previous standards promulgated by the Government Services Administration and by the Society of Automotive Engineers.

Mr. Dodge. Dr. Gregory, I believe it shows an abrupt halt in the issuance of the new safety standards over the 1974–75 period. In that period, as the chart shows, only one new standard has been issued.

Recognizing that looking at the issuance of just new standards is perhaps but one way to measure NHTSA's effort, we nonetheless would like to ask you whether you have been satisfied with the pace with which your Agency has been issuing new standards?

Mr. Gregory. The answer to that question is, in part, no, because I think there are things that should have been done a long time ago in the preparation to move forward on those standards.

One of the things that we lack and we have lacked since the beginning of the program is some of the data bases that we need.

However, the answer to your question is, in part, yes, because I think the hard work which has been done has improved the standards over the years and certainly during my tenure.

You cited one way of gauging the active work of the Agency. I had my staff look through the Federal Register citations of amendments to safety standards. Some of them were minor but some, I think, improved the standards. Let me read you the record of Federal Register citations beginning with 1971 or at least, if I may, let me enter it in the record.

Mr. Dodge. Can I suggest that we do have that list entered into the record rather than reading it off now?

Mr. Gregory. Let me say from 145 in 1971, it went to 219 and 224 in the 2 years that you mentioned.

Mr. Dodge. This is the total number——

Mr. Gregory [continuing]. Of Federal Register citations which modified and which improved, in our judgment, the standards.

[The following information was received for the record:]

List of Federal Register Citations of NHTSA Rulemaking Activity, Fiscal Year 1971 to Date

The following is a history of the total Federal Register rulemaking actions performed by the National Highway Traffic Safety Administration from fiscal year 1971 through the present:

	Federal Register citations
1971	
1972	145
1973	131
1974	171
1975	219
1976 (to date)	224
	129

These citations include such actions as advanced notices of proposed rulemaking, notices of proposed rulemaking, rules, amendments, denials of petitions, corrections, etc. Each of these citations involves all offices within the NHTSA in their preparation.

WHITE HOUSE ROLE

Mr. DODGE. Dr. Gregory, your predecessor, Douglas Toms, granted an interview in January of this year to Ralph Nader as reported in the press. At that interview, Mr. Toms detailed off-the-record White House interference in passive restraint rulemaking and named Peter Flanigan and John Ehrlichman in particular as those officials whose direct intervention brought about a 2-year delay of the passive restraint rulemaking.

This interview was reported in Mr. Nader's 10-year review of the automotive safety program entitled "Washington Under the Influence."

Mr. Chairman, I would request at this time that we also add to the record of this hearing relevant segments of this review.

Mr. MOSS. Both the material referred to by Dr. Gregory and——

Mr. SCHEUER. Mr. Chairman, in connection with this unanimous consent you have just made——

Mr. MOSS. There was a previous unanimous consent granted. I was merely instructing the reporter to include in the record at this point the material referred to by Dr. Gregory and the material just referred to by Mr. Dodge.

Mr. SCHEUER. I have a relevant unanimous consent request to make. In the material referred to by Mr. Dodge—the statement by Ralph Nader—there is a critical personal reference to Dr. Lawrence Goldmuntz who is a very distinguished scientist and a former advisor to the President.

I would like to ask unanimous consent that if Dr. Goldmuntz cares to address a brief reply that that be included immediately after the statement by Ralph Nader.

Mr. MOSS. Is there objection?

Hearing none, such will be the order of the committee.

[The documents referred to follow:]

[EXCERPTS]

WASHINGTON UNDER THE INFLUENCE: A 10-YEAR REVIEW OF AUTO SAFETY AMIDST INDUSTRIAL OPPOSITION

(By Ralph Nader)

INTRODUCTION

In 1966 the federal government was given authority to embark on a historic public safety effort—the humanizing of automotive technology. The Congressional

hearings of 1965 and 1966 established the facts and judgments for the legislation; namely, (1) that it was technically possible to build much safer vehicles; (2) that it was possible to do so in many areas with little or no additional cost and where this was not the case, the safety and economic benefits to motorists and society were greater than any added vehicle cost and, (3) that the law had a legitimate role to establish, through mandatory standards, the public interest in safer vehicle design and construction.

So meritorious and accurate were these judgments that in the face of determined opposition by the auto industry, and since 1969 the White House, significant successes have resulted in the halting and reversal of the large casualty toll on the highway. In fact the highway casualty epidemic is diminishing, making this national problem almost uniquely one that has responded to public policy actions in the past decade. In a period when calculating corporate lobbyists are striving to turn their obstructionist efforts into a more generalized public disillusionment with government safety and health regulation, the saving of thousands of lives and tens of thousands of injuries every year stands as a luminous rebuttal as well as a partial glimmer of what could have been accomplished had Presidents Nixon and Ford and several Department of Transportation officials upheld their oath of office to enforce the laws.

The drive to defeat sound regulatory programs by actively interfering with their implementation, in manner both corrupt and callous, has been one of the White House's most noxious traits in the past seven years. Whatever can be said about the lethargic and unimaginative leadership of the National Traffic Highway Safety Administration (NHTSA), as this report describes, the White House and, with few exceptions, the Department of Transportation climates were both political and suppressive of advancing auto safety and auto savings for consumers. The following pages note such political interference especially in the notorious case of White House action against the passive restraint (air bag) proposal.

With cynical recognition of what tragic consequences they were producing for the motoring public, Presidents Nixon and Ford played politics, mixed with an icy indifference, with auto safety. They traded off the savings of thousands of lives and billions of dollars gouged from motorists for political support and approval of the giant auto industry. Confronted with an opportunity to apply known technology and fair business practices to further auto safety, they chose defiant intransigence to faster reduction of a highway toll claiming over 130 lives and 10,000 injuries daily.

It is important to recognize that the failures of the NHTSA proceeded from obvious and correctible deficiencies in the regulatory environment. If backed by a White House sympathetic to the cause of auto safety, the program's leaders would have been chosen for their sensitivity as well as their administrative or technical competence. A mission of deliberate urgency would have avoided the institutionalized inaction and delay that has characterized the NHTSA, to wit:

"(1) a virtual *de facto* moratorium of its safety standards function;

"(2) unconsionable non-implementation of statutory deadlines and Congressional intent, ranging from its violations of the used car standard and tire quality grading system mandates to its obvious disinterest in pursuing its duties under the Motor Vehicle and Cost Savings Act;

"(3) repeated delays in establishing its own research and compliance testing installation so as to better enforce the regulations which are frequently violated with only minor and infrequent sanctions being applied. Even the research it has contracted for receives little quality evaluation and less application;

"(4) the great promise of the experimental safety vehicle program has appeared to embarrass the NHTSA into torpidity and program stretchouts which have discouraged or hindered the foreign car manufacturers. These companies, unlike GM, Ford and Chrysler, took Washington seriously in the early stages of the project and produced real design breakthroughs in light experimental vehicles suitable for mass production.

"(5) an almost ingenious ability to avoid promoting its own mission, to wit,

"(a) little use of the substantial Congressional favor behind the auto safety program;

"(b) reluctance, with one exception, to rebut industry lies and distortions about its program such as the cost of auto safety standards and the phony repetitions of inadequate lead times or insufficient engineering capability

"(c) refusal to issue consumer advisories on many subjects including, for example, staggering rise of spare parts prices and the lack of competition in this market. [A recent State Farm Mutual report observed that "crash parts prices are not subject to normal competitive restraints since almost all such parts are obtainable only from the car's manufacturer."]

"(d) refusal to hold regular press conferences to inform the public of conditions and developments and to respond to questions by the media. There is almost a passion for analymity which has worked well to bore the media into non-coverage. The NHTSA is not anonymous, in whole or in its parts, to the auto companies, however.

"(e) delight that the advisory committees to the NHTSA are filled with political patronage, industry representatives or, under the guise of the 'public representative' category, industry consultants.

"(f) no public rebuttals to the constant strategy of attrition pouring out of the cold-blooded and incompetent While House Council on Wage and Price Stability.

"(g) pursuit of secrecy or non-disclosure that often yields only to freedom of information lawsuits or specific requests by citizens instead of active dissemination of information needed by the public."

It takes no special insight to observe that these failures are correctible with different leadership. Indeed, Congress has given the Department of Transportation additional and strengthened authority since 1966 to perform its task. What is still needed is the passage of a government officials' accountability law and an affirmative program of citizen access, with federal funds for needy petitioners, to provide avenues of direct public discipline and direction for agencies afflicted with inappropriate, excessive or unlawful industry and White House pressures.

In short, government can work once its lawful authority is capable of regular and informed invocation by citizens who are supposed to be the ultimate beneficiaries of the process. This is no less true for the federal effort to advance auto safety—a program presently braked but still poised for rapid acceleration.

RALPH NADER INTERVIEW WITH DOUGLAS TOMS, FORMER ADMINISTRATOR, NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION (JAN. 5, 1976)

Congressman John Moss of the House Commerce Committee was later able to determine some more details of the White House involvement [in passive restraint rulemaking] which he referred to in the Congressional debates over the repeal of the interlock standard.

"The interlock was brought about over the objections of the Department of Transportation as a result of the visit of the presidents of two of the major manufacturers of automobiles with the President of the United States, and at a subsequent meeting attended by Mr. John Ehrlichman, Mr. Peter Flanigan, and another White House aide, the order was issued to the Department of Transportation to go along with the interlock rather than the alternative system which the Department of Transportation had under study as an intermediate device."

The White House's *ex parte* interference with the air bag (passive restraint) proposal at the Department of Transportation was confirmed last month in an interview with Douglas Toms, former head of the National Highway Traffic Safety Administrtion. The decision to defer the passive restraint standard was made at the Presidential level after visits by top auto executives, he said. Toms added that Peter Flanigan and John Ehrlichman were the two aides who took a close but hostile interest in the Department of Transportation's air bag deliberations both before and after the Department gave them a technical briefing on the air bag's effectiveness. Flanigan sent a memo to Transportation Secretary John Volpe which Volpe described to his associates in this way: "The White House told us to back off." He called a meeting of his associates to decide what to do, knowing that if he did not obey, it could mean his job. After much agonizing, Volpe relented.

The case of the NHTSA's failure to mandate lifesaving passive restraints clearly points out the need for regulatory reform—but for better regulation without *ex parte* Executive pressure, not for less regulation. For here was a deliberate and cynical consumer provocation, later reflected in Congress, by the auto companies to generate public opposition to government safety standards while they escape responsibility for their ploy. More importantly, the failure to mandate passive restraints for 1974 and later model year cars as a result of

White House interference has and will continue to cost thousands of vehicle occupants their lives as their cars without passive restraints were and are involved in serious accidents.

The inappropriate behavior has been exacerbated by the current NHTSA Administrator James Gregory's delay from the 1976 to effectively the 1978 model year, perhaps to placate President Ford's wishes for a moratorium on safety and emission requirements. Dr. Gregory could have easily satisfied all the procedural requirements within one year of taking office on August 6, 1973, and promulgated a passive restraint standard by the middle of 1974 effective for the 1977 model year. The serious impact of such postponements is reflected in former General Motors Vice-President John DeLorean's finding that delaying the introduction of front seat air bags as standard equipment in all cars for only three years will result in 37,600 deaths and more than $18.6 billion in social loss due to injuries and fatalities.

This meddling at the request of the auto industry was but one of several major White House attentions to the auto industry in recent years. In the late spring of 1971, the White House Office of Science and Technology was directed to prepare a report on the "Cumulative Regulatory Effects on the Costs of Automotive Transportations" (RECAT) that was a frontal assault on safety and pollution standards when it was issued in early 1972. To assure tighter control of consumer programs and other proposals disliked by big business, the White House Office of Management and Budget on October 5, 1971, ordered all federal agencies other than the independent regulatory agencies to clear through OMB all rules and guidelines pertaining to environmental quality, consumer protection, and occupational and public health and safety. The purpose was to inform the White House political operatives of any agency actions which would inconvenience corporations by requiring them to engage in greater safety or health practices. The sheer volume of the assignment and the diversion of the 1972 election effectively undermined this inappropriate attempt at political interference with administrative regulation.

President Nixon's startling economic program including price controls was a big grabbag for the auto industry. The auto companies manipulated exemptions and exceptions to the price controls with so-called "new" models, changes in accessory equipment, and demands for price increase approvals. The import surcharge hampered the only price competition facing the domestic industry. Other economic bonanzas for the auto industry included accelerated depreciation for capital equipment and excise tax cuts.

More recently the White House Council on Wage and Price Stability has undertaken the major mission of opposing all automotive regulations with artifically inflated estimates of the cost of regulation while displaying an icy indifference to the value of life and limb. Targets in 1975 have been passive restraints, truck brakes, motorcycle emission control and bumpers.

Nor is the White House Office of Management and Budget lagging behind the Council on Wage and Price Stability in questioning the costs of federal regulation without adequately looking at the benefits. In early 1975 the Office of Management and Budget required the NHTSA to submit a lengthy response to a list of hostile questions prepared on passive restraints by none other than the former director of the RECAT study who also consults for the auto industry, Dr. Lawrence Goldmuntz.

Reply of Lawrence A. Goldmuntz

The report, "Washington Under the Influence", by Ralph Nader dated February 23, 1976 excerpts from which are included in the hearing record of the Subcommittee on Oversight and Investigations of the Committee on Interstate and Foreign Commerce, is in substantial error. In particular it is in error with respect to the origin and conclusions of a report "Cumulative Regulatory Effects on the Cost of Automotive Transportation" RECAT. This report was undertaken at my request acting under my responsibility as an Assistant Director for Civilian Technology in the Office of Science and Technology (OST) in the Executive Office of the President. White House officials did not direct me to undertake this study, in fact they were somewhat wary about tackling a technical issue with such political ramifications. This is contrary to the Nader implications that OST followed executive office directives that were prompted by the automobile companies.

More importantly, the report was not an assault on safety and pollution standards as Nader claims. In this regard the report can best speak for itself. The following are quotations from the RECAT report:

SAFETY ISSUES

General considerations

The direct regulation of motor-vehicle design and performance through the promulgation of Federal Motor Vehicle Safety Standards, as it has been practiced to date, is found to yield expected economic benefits, in terms of deceased costs of injury and property damage, that are greater than the costs to the consumer of the vehicle design modifications, and hence can be said to reduce the aggregate cost of automotive transportation.

Similarly, the imposition of advanced highway standards, as exemplified in the design of Interstate highways, yields 30-year safety benefits whose present value amounts to 58 percent of the investment costs of the highways. When estimates of motor vehicle operating cost reductions and the value of time savings are added to the safety benefits, Interstate highways return far more in benefits, over a 30-year time span, than their original investment costs.

Bumpers

It appears that the predicted benefit of 5-mph bumpers in terms of mitigation of direct vehicle damage is almost equal to their cost. When other direct costs (loss of use of vehicle, etc.), and the pro-rated cost of administration of collision insurance (averaged over uninsured as well as insured vehicles) is taken into account, the benefit of MVSS 215 bumpers substantially exceeds their cost.

Though the promulgation of MVSS 215 stirred controversy among automobile manufacturers, insurance companies, and consumer advocates, the standard carries with it no implication of a requirement for application of advanced technology. Meeting the standard required only straightforward engineering and restyling; the physics is well understood; (12); and safe, reliable designs were readily evolved. The requirement represents, in some respects, a reversion to the 1920s and 1930s, when bumpers were protective devices, rather than ornaments.

TABLE II-6.—COST AND BENEFIT FACTORS FOR IMPROVED AUTOMOBILE BUMPERS

	Bumper heights, estimated benefits		Estimated cost
	Mismatched	Matched	
5-mi/h front, 2½-mi/h rear no-damage bumpers:			
Property damage	$58	$77	
Other direct	9	12	
Insurance administration	56	75	
Total	123	164	$55
5-mi/h front and rear no-damage bumpers:			
Property damage	90	112	
Other direct	15	19	
Insurance administration	70	87	
Total	175	218	119

Passive restraints vs. *Mandatory seat belt use*

Perfect passenger car occupant protection is a desirable objective, whose potential annual benefit is $8.8 billion, or $935 per car lifetime. In pursuit of this objective, Motor Vehicle Safety Standard 208 was issued. It includes a requirement for "passive" occupant protection effective August 15, 1975. Passive restraint systems, which are defined as requiring no action on the part of the occupants to make them effective, are in process of development. The passive system that has received the most attention is the air bag. A few are being installed for front-seat protection in certain car models. Considerable further development must be successful to make them effective in other models, to protect rear-seat passengers, and to protect otherwise unrestrained occupants in rollover and side-impact accidents. Earlier-reported potential hazards of air bags—noise, toxicity, eye damage, and injury to out-of-position children—appear to be resolved or in the process of resolution. The air bag is substantially higher, and

the predicted benefit is no greater, than the corresponding cost and benefit of the well-known, time-tested, 3-point belt harness system. However, the belts require occupant action to make them effective, and their utiilzation rates are currently so low that most occupants go inadequately protected. Although MVSS-208 also requires warning systems in 1972 and interlocks in 1973 that are expected to increase belt utilization substantially in the next three years, the "passive" restraint requirement is to be imposed in 1975 regardless of the extent to which belt utilization is improved by these measures. Thus, large added costs (about $300) per car are to be imposed on automobile consumers whether or not added benefits can be expected. A potential alternative is, through local ordinance, to mandate the wearing of seat belts. Such a step was taken by the State of Victoria, Australia and increased usage rate of belts to 75 percent.

Miscellaneous safety issues

Safety improvements that have enormous, and to date unrealized, potential benefits are elimination of drunk drivers ($3.8 billion), mitigation of pedestrian casualties ($1.9 billion), and adequate emergency treatment of accident trauma ($1.4 billion). The importance of these is recognized by the Highway Safety Program Standards issued by the Secretary of Transportation.

ENVIRONMENTAL ISSUES

Automotive emissions

Relaxation of the prescribed Federal limit for 1976 of 0.4 gm/mi NO_x to approximately 1–2 gm/mi would greatly reduce the cost of controlling NO_x, which is the most difficult automotive pollutant to suppress. The effect on ambient air of such a relaxation would be minimal in many locations in the U.S.

A "two-car strategy" for the country might well be a sounder approach than the present national approach to the automotive emissions problem. This strategy calls for the production of two types of vehicle: a high-cost, low-emission automobile for those regions in which automotive pollutants are of major importance to ambient air quality would not be essentially degraded by these less controlled vehicles.

Interaction of mobile and stationary sources

Stationary NO_x sources—power plants and space heating units—dominate this region so strongly that NO_x pollution would not increase substantially, even if the 1976 automotive NO_x emission control were relaxed by as much as a factor of 3 from its currently specified level, i.e., from 0.4 gm/mile to 1.25 gm/mile, as shown in Fig. 2. This less stringent NO_x control level would correspond to a 60-percent reduction of automotive NO_x contribution from its value in the peak year of 1970. In Los Angeles, however, the situation differs quantitatively from that in the New Jersey-New York-Connecticut Region, because the automobile currently is the major contributor to NO_x pollution in Los Angeles.

The relative costs of removing pollutants from mobile and stationary sources should be investigated further in order to place air-pollutant control on a rational economic basis. Costs of compliance should be included in the factors considered for the control of all new mobile emission sources as it is for stationary sources.

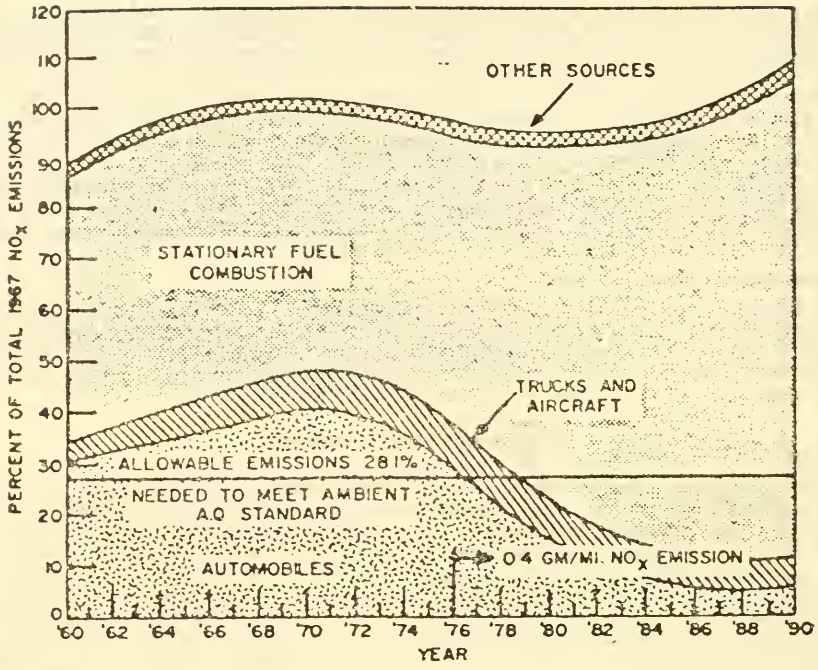


FIGURE 1.—Projected changes in total nitrogen oxide emissions in New Jersey-New York-Connecticut Air Quality Control Region. (Adapted from fig. F–5 in app. I–F.)

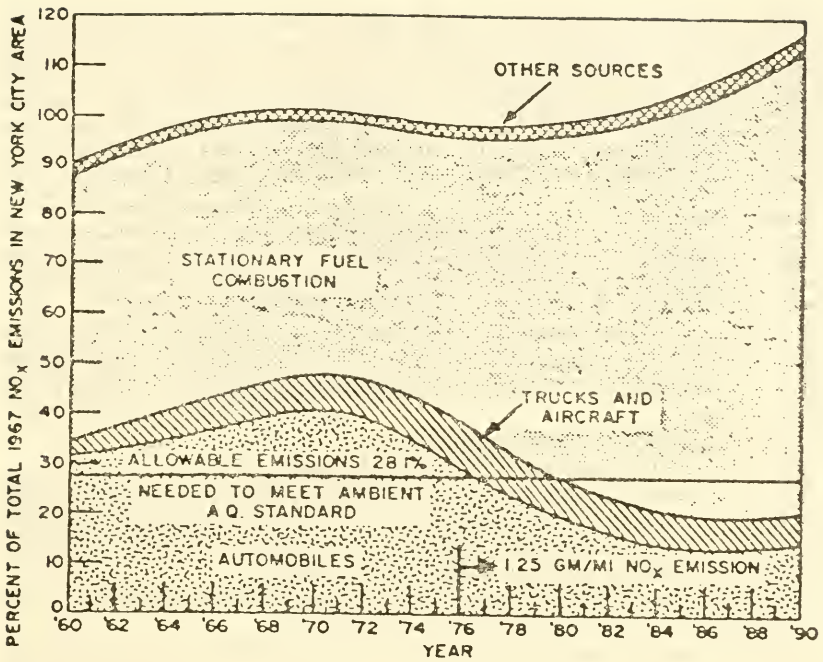


FIGURE 2.—Projected changes in total nitrogen oxide emissions in New York-New Jersey-Connecticut Interstate Air Quality Control Region based on 1976 light-duty vehicle standard of 1.25 gm/mi. (Adapted from addendum A, app. I–F.)

The automotive NO_x statutory standard

A major portion of the control costs previously discussed is attributable to meeting the 1976 model year NO_x standard of 0.4 gm/mile. On the basis of information which this Committee has received from numerous experts, it would appear that the permissible level of NO_x emission could be increased to 1 to 2 gm/mile without materially harming the effort to improve ambient air quality in many regions. The technology for achieving this level of NO_x control is virtually at hand and would impose a relatively small economic burden upon the consumer for engine modification and fuel penalties. Specialized controls or automotive use restrictions could be adopted in those areas where an increased NO_x level would not be acceptable. Such a system would relieve the great majority of citizens from paying an unnecessarily high price for motor vehicles. Relaxing the NO_x emission standard as suggested would require Congressional action.

Thus, the RECAT report supported motor vehicle safety standards, including 5 m.p.h. bumpers, but suggested mandatory seat belt laws as an alternative to air bags. RECAT supported automotive emission standards except for the 0.4 grams/mile NO_x requirement. RECAT suggested that control of NO_x should take into account emissions from both mobile and stationary sources. since it might be more cost effective to remove NO_x from stationary sources. EPA now agrees with these RECAT positions. However, EPA has not accepted the "two-car" strategy proposed by RECAT—a clean car in highly polluted areas and a car with less stringent standards in less polluted areas. However, a number of other studies have treated the "two-car" strategy with favor, in particular a University of Chicago study called "Urban Transportation for the Environment," a National Science Foundation supported study entitled "The Automobile and the Regulation of Its Impact on the Environment" and the National Academy of Science evaluation for the Committee on Public Works, United States Senate. September 1974, Volume 4.

With respect to the remaining Nader implications, the bulk of support for Economics and Science Planning, Inc. has come from Federal agencies. We have no programs with automobile companies. A number of years ago I was interested in attempting to convince automobile companies to promote personal rapid transit (PRT), an advanced public transportation mode. I did some work for the automobile and computer industry in that regard for which ESP was compensated. ESP has also consulted with fuel injection and catalyst manufacturers, neither of whom would benefit if our view on automotive emissions were to prevail.

Nader's requirement to discredit those who differ with his own views is an unfortunate development in consumer advocacy. There is room for honest difference on issues such as (1) air bags vs. mandatory seat belt laws, (2) removing NO_x from automobiles or power plants, (3) fuel economy vs. automobile emission standards. Lowering the standards of debate is of no service to anyone.

Mr. DODGE. To return to the question, Dr. Gregory, can you please share with the subcommittee your experiences, if any, with White House involvement in NHTSA's regulatory program during your time in office?

Mr. GREGORY. You say interference?

Mr. DODGE. "Involvement" is the word I used.

Mr. GREGORY. My contacts at the White House have been solely limited to infrequent discussions. We have had discussions with the Council on Wage and Price Stability, as you know, and the majority of those have been placed in the relevant dockets.

We have had informal contacts, not involved in regulatory procedures, with members of the Domstic Council.

I can say categorically that no one in the executive branch, and that includes the whole executive branch, has ever come to me and said, "Dr. Gregory, you are not to do this or you are to do that." I have felt an independence of action.

If I have felt a desire for advice, I have gone to either former Secretary Brinegar, Secretary Coleman, or Deputy Secretary Barnum, to let them know how I was feeling.

I have in no cases that I can remember, and I am sure they would stand out if there were any, been told this is not policy, you cannot do that.

I have felt as independent as I could be in this Agency. Whether we like it or not, we all have a boss. I seek their advice on many things. But I cannot say I have had anything that could be classified as direct interference with my programs or with programs of the Agency, or with the actions which I have taken.

Now there may be discussions of our programs and actions. I get the feeling sometimes they wish I wouldn't put out such controversial regulations, but no one has ever stopped me. I have felt as independent as one can be working within an executive branch whose boss is the Secretary of Transportation.

By the way, I have the highest regard for both Secretaries with whom I have worked, as well as for Mr. Barnum.

Mr. DODGE. Thank you, Mr. Chairman.

Mr. MOSS. The Chair at this time is going to recognize the gentleman from Texas, who has to leave. He stayed over in order to assist in getting hearings underway this morning.

At this time, Mr. Collins, you are recognized.

Mr. COLLINS. I thank the Chairman very much for allowing me to come in right now.

I want to say first, Dr. Gregory, it came as a surprise and with regret to learn that you are leaving this Agency. I appreciated particularly, as one who is very critical of the functions of your Agency, the fairness with which you have always treated me. I know on this seat belt situation I have always been a most outspoken critic of the whole system.

You not only invited me to a hearing, you followed up on it when you had that hearing.

I would like to add this: I think I have heard from every critic you have both in business and as individuals, but I have never heard one single individual ever suggest that you be replaced.

So, we might differ with you in principal, but I don't think anyone has differed with you as to your administrative ability.

Mr. GREGORY. Thank you, Mr. Collins. I take that as a sign that our representative democracy is working.

Mr. COLLINS. It really does.

Now, after saying that, I would like to start in on a few things you are doing and I am wondering about.

Now, we talk about school buses and developing more safety in school buses. It would help discourage this country from using school buses as much as they do. The real problem in America on safety of school buses is the fact that children are not walking to schools in the neighborhood as they should.

Now, I want to get on to the subject of highway standards. Our counsel brought out very well the fact that there have been very few standards brought out in 1974 and 1975, but you in turn said we have amendments on the amendments on amendments. Your agency is still under the mandate, as you spoke of it, to provide for everyone's safety.

There are many people in America today who would just as soon do the thinking for themselves. We have so much of this mandating in America that you can't do it. I was sitting and thinking, as I went through this, about breakfast cereals. I have now become a complete disciple of natural breakfast cereals. I think they are the greatest thing in the world. My wife uses Total, my three kids won't use any of them. My grandchildren have this trash. Up and down the line we have this full spectrum.

In our case we believe we are all better off and we all know what we are doing.

RESTRAINT SYSTEMS

When we got on this seatbelt business and put that buzzer on it we started thinking for America. I have never needed my seatbelt but two different times I have had those buzzers break. I tell you one thing that will drive a person crazy, and Americans crazy, is to spend a day with that buzzer.

Mr. MAGUIRE. Will the gentleman yield?

Mr. COLLINS. I yield.

Mr. MAGUIRE. I understand the gentleman from Texas feelings about the seatbelt question, but the thing that perplexes me when it is brought up, as it is frequently in these hearings, is the relationship between the decision to go ahead with the interlocking seatbelts and the decision at the same time not to go ahead with the passive restraint airbag approach.

From my understanding of the historical record which has been developed on this subject, it is the auto manufacturers themselves who managed to get the political decisions made which proceeded with the interlocking seatbelt system which was a folie applicacious.

Here we are sitting today with NHTSA talking about the absence of the action on the passive restraint system which everybody knows is a very effective system and which would not involve all the buzzers and all the rest of it.

I wanted to make that point while the gentleman was making his.

Mr. COLLINS. I thank the gentleman from New Jersey.

We are now on the seatbelt and all the statistics show it is the best. Now we are talking about these passive airbags. I want to put in the record right now the result that General Motors has had.

They have been offering these airbags and they have had them as an option for anybody in a Buick, Cadillac, or Oldsmobile that wants to have them. They were only able to sell 10,000 of them during the years 1975 and 1976. They had the price pretty reasonable, $325. So they might be a good thing but the people just simply didn't want them.

Mr. Moss. At this point under the previously agreed upon unanimous consent, the item referred to by the gentleman from Texas will be placed in the record.

[The document referred to follows:]

GM AIR CUSHION OPTIONAL EQUIPMENT ON 1974-76 OLDSMOBILE, BUICKS, AND CADILLACS PRODUCED AND DELIVERED

	Produced	Delivered	Retail price
Model year:			
1974	5,630	[1] 5,400	$225
1975	4,005	[1] 3,343	300
1976	[1] 197	[1] 90	315

[1] As of Jan. 31, 1976.

Note: The number of ACRS vehicles shown as having been delivered include all vehicles that our records show were actually delivered to customers but does not include vehicles in General Motors fleets, in test programs, used as dealer demonstration models, or sold to Canadian distributors.

DRINKING DRIVER PROBLEM

Mr. COLLINS. Thank you, Mr. Chairman.

Let me get down to one thing that really concerns me as to safety. I am opposed to this DWI situation. When a guy is driving drunk, it is not a matter of looking out for your own skin, that the guy might hurt me. What department do you have working on DWI?

Mr. GREGORY. Mr. Collins, under the authority of the act which empowers us to issue traffic safety standards and carry out research in this area, we have an alcohol countermeasure standard. To support State efforts to implement the standard, we have conducted a number of demonstrative projects in which we have been able to identify important features of the alcohol problem on the highway.

These are known as the alcohol safety action projects, one of which was in the State of Texas, if I remember correctly.

Again, we know that at least half the fatalities and a large, almost equal share of injuries on the highway are involved with the drinking driver in some way. All sorts of things have been tried, everything

from very hard-nosed laws which sometimes are not carried out to the soft approach which is unsatisfactory to many people such as yourself.

I think that a discussion of this problem and what we have been able to do would be rather lengthy. Nevertheless we would be most happy to brief you and your staff on our results.

Generally speaking, what must be done is involve the entire enforcement and adjudication community as well as the public, in the problem so that the laws are fair and reasonable, the enforcement is good, and the judge on the bench has options based on the type of offense and type of individual involved. In the long run, we have been able to find that through this kind of pressure on both the social drinker as well as the alcoholic that we are able to make progress.

Now, changing human habits is a long and involved process. We can change roads and we certainly can change automobiles for safety, and those physical engineering changes have effects that are felt quite rapidly.

You can draw a learning curve in the physical engineering area that is much steeper than in the area of changing human habits. In many European countries where society has decided that the drinking driver is socially unacceptable, real progress has been made.

Until we come to that approach, encompassing the individual, the family, the community, and the State and Federal Governments, we will not really have a heavy impact on this alcohol problem of which you speak.

Mr. Collins. Dr. Gregory, in that respect England has made it their number one drive on traffic safety. They have concentrated on it. Have you been able to get their figures or is it possible to send somebody to England to make a study?

Mr. Gregory. I would be happy to. They have had an unfortunate experience which I think they are now reexamining. They started out originally with a very, very tough enforcement program.

Unfortunately, they did not keep it on long enough and I think, as people find out enforcement is not there, there is, as the technicians say, a good bit of recidivism and the problem is recurring.

They are beginning to revive a tough program over there. We will be happy to send all the results they have achieved.

Mr. Collins. Thank you, Mr. Chairman.

Mr. Moss. The gentleman from New Jersey, Mr. Maguire.

Mr. Maguire. Thank you, Mr. Chairman.

COUNCIL ON WAGE AND PRICE STABILITY

Dr. Gregory, I am anxious to pursue with you for a moment the question of the Council on Wage and Price Stability as it relates to the efforts that you have been undertaking.

Criticisms have been made by the Council, they have criticized you for the poor quality of your data from time to time and then they have also criticized you for imposing too much of a cost burden on manufacturers when you have tried to go collect data, a juxtaposition which I find, to put it in its most mild form, ironic.

I wonder if you would comment on that specific matter and then more generally on how you feel about the intervention of the Council and how you feel about its criticisms of your agency's work.

Mr. GREGORY. First of all, the Council on Wage and Price Stability has entered into several dockets their official comments on their position. I think the data to which you refer, has to do with accident data on which we based our decision relative to the airbrake standard.

I accept the Council on Wage and Price Stability's capabilities to make an economic analysis. I do not accept the Council on Wage and Price Stability as experts in accident analysis. That is perhaps where we parted ways as far as their comments on the airbrake standard are concerned.

We certainly will consider their comments and anyone else's. It is our job to hear opinions. But we did not, on the basis of their comments on the airbrake standard, cease to move ahead.

Mr. MAGUIRE. When you say you don't accept their expertise in the field of analysis of accidents, are you referring to factual analysis? Are you referring to economic analysis of the facts, or are you referring to evaluate judgments as to what the interpretation of those facts and analysis might be?

Mr. GREGORY. I felt I must disagree with them and I believe I said in the hearing in which they appeared on this subject, that I really don't feel that they should or can compete with us in the area of accident analysis.

I feel we have the experts who are able to analyze the causes of accidents.

Mr. MAGUIRE. Have they tried to do that?

Mr. GREGORY. They have made such an analysis and it was part of their statement at the hearing on the airbrake standard.

Mr. MAGUIRE. As I understand their role and their mandate, it is to assess the inflationary impact.

Mr. GREGORY. That is my understanding.

Mr. MAGUIRE. And your experience has been that they go beyond that?

Mr. GREGORY. Well, they did in this instance. I can't criticize them for wanting to look at the data and wanting to make their interpretations, but when we have made an assessment, I have to either accept their assessment or ours.

In the case of accident evaluation, we have the experts in NHTSA. I would not propose to have them accept my economic analysis walking in as a chemist and trying to impress them with my economic expertise.

Mr. Moss. Will the gentleman yield?

Mr. MAGUIRE. Surely.

Mr. Moss. As one of the authors of the basic legislation it is my recollection that this committee rejected economic impact analysis as being a prerequisite for the promulgation of regulations, and any effort by the Cost of Living Council or the Council on Wage and Price Stability to impose such a requirement is violative of the law as clearly as anything could ever be.

I would say to them that if evidence persists that they are trying to do so, I will summons them before this committee and have them put on the public record exactly where they derive their authority.

Mr. GREGORY. Mr. Chairman, I respectfully say that I also have to operate under Executive Order 11821 from the President, on analyzing the inflationary impact.

Mr. Moss. Doctor, Executive orders do not supercede statutory law. Nor does this Member ever intend to suffer that to happen.

Mr. Gregory. If I may, I must say that as far as evaluating safety standards, Mr. Chairman, or any regulations, I think that we all probably agree that we want to know, when we write a regulation, the impact on the industry or the pocketbook as well as the benefits.

Mr. Moss. You do indeed, Doctor, excepting where Congress says after carefully considering it that you need not do so.

Mr. Gregory. If I might finish. Putting it a different way, we all want to know the benefits as well as the costs. These costs are not in dollars alone. They are costs also in time and inconvenience and other things.

Mr. Moss. Tangible and intangible, both.

Mr. Gregory. That is right. I will say as responsible regulators that we should have a pretty good idea of these costs as we move through the rulemaking process.

I don't mean that NHTSA has ever regarded economic analysis as determinative. We know what the statute says. One of the first things I did when I came to the Agency was review what the statute said and what subsequent interpretations by the court or by conference reports indicated it meant.

Certainly we have never treated economic analysis as a barrier to a standard.

Mr. Moss. I would not want this record to infer that I am alleging that you have. I merely want it to reflect my concern over the efforts of the Council on Wage and Price Stability to impose that on you and to serve clear warning that we do not intend to tolerate their doing so.

Mr. Gregory. I think we agree that analysis of the costs, and again the costs can be many things, and of the benefits are something that men ought to know as they proceed to write regulations which are derived from basic legislation.

While making such analyses requires resources I don't think that our policy has ever been such that analysis is a severe impediment, and I would hope that it never is. Nor have I allowed outside influences in this regard to be controlling.

I think many of these inputs, done well, can enhance our mission in a way because we do not have to devote as many resources to those issues.

I would look to the Council, with experts in the process of economic analysis and so forth, to help us do our job. I bring up this other point that I rejected their advice given as experts on accident analysis.

Mr. Moss. I think they are confined to wage and price stability and they are not to be involved in things where we specifically excluded them.

I thank the gentleman for yielding.

Mr. Maguire. Thank you, Mr. Chairman.

Doctor Gregory, would you say that the Council's interpretations with NHTSA have added in any substantial way the length of time that it takes you to generate safety standards?

Mr. Gregory. I think I must stand on my previous statement, Mr. Maguire, that their inputs to us have been considered carefully. But

I would not say they have in any way materially impeded action apart from our studying what they have to say.

Mr. MAGUIRE. Thank you.

Could you explain, in your own mind, the Council's major objections? Do you understand why they have objected?

What pressures are at work in the situation in your judgment?

Dr. GREGORY. I really feel that the criticism that the Council has leveled at, for instance, the airbrake standard is that they feel there was inadequate analysis of the accidents from which we could derive the benefits to be gained by issuing the airbrake standard.

I also must ask myself the question: If somebody says "these aren't enough data," how much do they think we really need?

We know when we propose standards, particularly in accident prevention-type standards, it is very difficult to get data on equipment that may not yet exist. What we can do is analyze the problem and if we feel that we have, under the law, a practicable effective method of correcting that safety problem, then we can move ahead while making good analyses, so that if we find that we are off the mark, we can stop at any point.

As I say, I really feel that anyone, the Council or anyone else, can say we don't have enough data to adequately identify the problem.

Mr. MAGUIRE. As you have said, and as we all know, we are talking about people's lives here.

Mr. GREGORY. That is right.

Mr. MAGUIRE. We have 45,000 deaths a year. The evidence suggests that if standards were put in on passive restraint systems, for example, that we could cut that by some 10,000 a year.

Is that correct?

Mr. GREGORY. Based on our analysis, we would find that if people used the restraints that are now required, or if there were an alternative such as the passive restraint, many people come out with an estimate of about 10,000 additional lives would be saved per year in today's world.

DOLLAR VALUE OF A HUMAN LIFE

Mr. MAGUIRE. How does the Council evaluate those lives? Do they put a dollar figure on those lives when they criticize your cost-benefit analysis?

Mr. GREGORY. I might refer this to Mr. Dugoff because he has looked at many of their analyses, but I think by and large they have accepted our dollar figures.

Mr. MAGUIRE. Which is $240,000?

Mr. GREGORY. Basically so. As a matter of fact——

Mr. DUGOFF. Yes, sir.

Mr. GREGORY. May I have Mr. Dugoff add something?

Mr. MAGUIRE. Yes.

Mr. DUGOFF. In summary, I think the position of the Council on Wage and Price Stability vis-a-vis the passive restraint standard is that the analysis that the NHTSA has been able to perform to demonstrate the magnitude of benefits that would accrue, given the existence of a passive restraint standard, is not sufficiently definitive as to warrant the expenditure of funds which the promulgation of that standard would require.

Mr. MAGUIRE. That is what they say?

Mr. DUGOFF. Yes, sir. This, again, as Dr. Gregory put it, is a matter of value judgment as to the level of rigor of analyses and the amount of data that is required for regulatory decisionmaking.

Mr. MAGUIRE. You know, we all know, that we are talking about, roughly speaking, 10,000 lives a year. Do they dispute that?

Mr. DUGOFF. Yes.

Mr. MAGUIRE. Suppose it is three-quarters of that or half that? The thing that frankly astonishes me is, here we have, and here we are reading from a release of November 26, 1975, from the Council on Wage and Price Stability and the final paragraph says:

> In any case we would hope that NHTSA's final information requirement will balance the legitimate need for such information against imposing additional costs on manufacturers and discouraging manufacturers from legitimate speaking out against future NHTSA regulations.

I don't see anything in here about human life. Even the $240,000 standard strikes me as something that ought to make us all very angry.

Is a life worth $240,000? If we know that something can help in significant numbers, what conceivable excuse can there be for not proceeding on it and in particular, how can it be balanced against esoteric stuff about legitimate need for information and so on?

Mr. GREGORY. Mr. Maguire, I receive much criticism, including criticism from the Council on Wage and Price Stability. I must take what they say in the same context as I take everybody else's.

Mr. MAGUIRE. Have they ever proposed faster action or better standard or are they always on the other side of the fence?

Mr. GREGORY. I think based on our infrequent contacts I would have to say no. I never heard them ask me to speed something up.

Mr. MAGUIRE. Or produce a better standard?

Mr. GREGORY. Let me say that I think implicit in some of their remarks is their belief that we have a good standard but they have taken issue with us in some of the analyses.

Mr. MAGUIRE. They are part of the White House, right?

Mr. GREGORY. They are a member of the executive branch; yes, sir.

Mr. MAGUIRE. Would it be fair for me to suggest that there might be some reason to believe that automobile manufacturers and truck associations have had undue influence on the deliberations of the Council on Wage and Price Stability with regard to the matters that your Agency is supposed to deal with?

Will you comment on that?

Mr. GREGORY. I have no idea on that, Mr. Maguire.

Mr. MAGUIRE. No suspicions?

Mr. GREGORY. I have no suspicions in that regard.

Mr. MAGUIRE. Have they had any influence that you know of?

Mr. GREGORY. I am sure that that is the position of a variety of people. Whether it is an industry or an individual, they have the right to put their views before any number of people in the executive branch as well as before the Congress or before NHTSA.

The thing that I would be concerned about, and I am glad I can answer in the negative, is whether the Council on Wage and Price Stability has been an impediment, and whether I felt that they have interfered with what I am trying to do.

If they could pressure me to change my mind, if they could pressure me to stop a regulation, then I would be worried.

Mr. MAGUIRE. They don't have to be that heavyhanded. The objective is served; namely, if you don't issue standards as in the case of passive restraint systems, then they don't need to do any more than that, do they?

Mr. GREGORY. Well, that is a kind of long shot, I think. I don't quite understand what you are implying. In other words, your question is, if they just keep sending us memos, will that stop a standard from being issued.

Mr. MAGUIRE. The automobile industry has consistently fought over a period of years every step that has been proposed for improving safety and efficiency of vehicles and so on. There is a record of that sort.

There is also a record which indicates that they have been able, through bringing political pressure to bear on the White House and on Congress, to get yet additional extensions of this and that and the other thing and to fuzz up the isues and to actually frustrate the objectives of this 1966 legislation and certainly to frustrate, I would say, rapid and timely action by your Agency.

Looking from the outside, that is the way it looks.

Mr. GREGORY. Looking at it from the inside. I don't share that concern as far as my Agency and me personally have been concerned.

Mr. MAGUIRE. It has nothing to do with your resignation?

Mr. GREGORY. Absolutely not. As a matter of fact, I think one of the things that I have done voluntarily in advance as our studies developed, is that I have actually had discussions with them, as I have indicated, on what our results are showing.

I have, if you will, put in my 2 cents in their thinking just as you imply other people have.

OBTAINING INFORMATION TO SUPPORT REGULATION

Mr. MAGUIRE. One moment, Mr. Chairman—and I am well aware you have been generous with time here—your statement on page 15 says that the industry is a major source of information regarding the cost of safety regulations.

We have that and then we have the Council on Wage and Price Stability in the memo just quoted a moment ago saying above all else let us not attach too much additional cost to industry for finding what the facts are about safety regulations.

What are we to make out of that? If you only could get the data from one place and you can't even get it from there because it might inconvenience somebody or increase costs slightly, where do we go from there?

Mr. GREGORY. Let us clear up what the Council was referring to in regard to our inquiring for information. I think perhaps Mr. Berndt, our Acting Chief Counsel, could help us with that.

Mr. BERNDT. I think, Mr. Maguire, that it is true that industry has a lot of information and you do put your finger on the point—

FROM THE AUDIENCE. Louder.

Mr. MAGUIRE. Could you speak a little louder, sir, into the microphone?

Mr. BERNDT. That some of the information that you are focusing on is not available. We recognize that.

Mr. MOSS. The only people who can be concerned with the volume level are the people here. I can't guarantee that everyone in the hearing room can hear every witness.

I want this clearly understood. No person in this audience ever interjects in a hearing room under my control. Let us have no more of it or you will be excluded from the hearing room.

You really want the volume up because you are recording it. That is your problem, not mine.

You may continue, Mr. Berndt.

Mr. BERNDT. Thank you.

We do reach a point, as standards become more sophisticated, where we try to improve our data bases. But some of the information just referred to, from the Council on Wage and Price Stability and from industry itself, is not as you have pointed out available.

So, we have to take the data that we do have and make judgments from that.

With respect to the Council on Wage and Price Stability analysis, as Dr. Gregory has said, we defer to them in the economic area. They perhaps may think they are making economic analyses when they are analyzing——

Mr. MAGUIRE. Did you say defer to them? What did you mean by defer?

Mr. BERNDT. That is the wrong word. We consider their comments like all others. I again must point out that I think they have only really commented on three standards. Where they made a truly substantive comment and a clear recommendation on what to do, we rejected their recommendation. They asked us to suspend the 121 standard and we did in fact reject that request, based upon our own analysis of the data.

Mr. MAGUIRE. One final question. We have agreed here that the industry is a major source of information regarding the cost of safety regulations. That is what I saw in your statement. You then go on to indicate that the costs that are projected for added-on equipment are not by any means the costs that would be projected for designed-in equipment, amortized over a period of time and so on, and in addition if distinctions were made between what they would have done in any case and what they are doing as a result of official regulations.

We are familiar with the pattern of loading costs on a particular item if you think it serves some purpose. What discount figure do you use, if any, on the cost data that they supply to you based on those considerations?

Mr. GREGORY. We have some basis for this. Let me talk about the interlock for just a moment.

As I recall, the average figure was on the order of $46—excuse me, if my memory is not exactly right, but it was of that order—which the industry I believe by and large indicated was the cost of the interlock system.

As I remember, one manufacturer immediately following the removal of the interlock reduced the price of his cars $13. There were no other reductions in price.

Now, again, I would like to adjust the record for those figures if I may, Mr. Chairman.

Mr. Moss. You may indeed at the time the transcript is sent to you change those figures to conform to the more accurate figures.

[The following information was received for the record:]

ADJUSTMENT OF COST FIGURES FOR THE INTERLOCK

The average figure for the cost of the seatbelt interlock was $46.80.

Mr. GREGORY. That is right. I think it has to be done, Mr. Chairman, it will vary depending on our analysis.

By the way, we have recently written to all motor vehicle manufacturers to determine the amount of reduction in the price of a vehicle that would result if existing safety standards were abolished.

What I am trying to establish in all candor is exactly what the designed-in safety standards really cost today. I think that those figures will be most important to us in trying to find some sort of standardized discounting, if you will, for the future.

Mr. MAGUIRE. You don't believe for 1 minute the figures that are given by the manufacturers——

Mr. GREGORY. I might believe some of them based on our assessment of the situation. After all, we do have availability——

Mr. MAGUIRE. Which way is it?

Mr. GREGORY. Let me say this. When the figures come in, Mr. Maguire, we give them a thorough going over. To say I don't believe anything anybody sends me would be erroneous. I think we have a right to be suspicious of the initial cost figures that are put together by the industry on any standard.

And they have a right to be suspicious too because sometimes they don't know.

Mr. MAGUIRE. Have you ever had any evidence that any figure submitted to you was a correct figure? Has it ever been borne out?

Mr. GREGORY. That is a rather broad question. Perhaps Mr. Carter who deals with these figures day to day might wish to comment on that.

Mr. CARTER. Mr. Maguire, the figures that first come in are usually on the high side. I think the industry would probably respond that that would be a very natural thing to do because at that time they are estimating and it is to their advantage to estimate on the high side.

As Mr. Gregory points out, we take their figures, analyze them, and draw our own conclusions from them.

Mr. GREGORY. We have some basis for evaluation because we also pretty well know the suppliers' figures of any supplied items. So we are able in various instances to establish a reasonably accurate figure. At times, the figures themselves become a part of the regulatory process, as a part of the debate.

So I really feel that we are sometimes very much in the dark. Recently, for instance, we heard various anticipated costs for the 121 airbrake standard. In many ways, we had a better feel for the actual cost.

I will be happy to supply from the docket, if I may, Mr. Chairman, the estimated cost which I believe was on the order of $1,800 to $3,000 per vehicle and again this is a rather broad average. It was interesting,

at least as reported in the Automotive News, and I will be happy to supply the article for the record, if I may, that the estimated reduction in the price of non-121 equipped trucks during the 2-week stay of the regulations on the order of, I believe, only $450 to $1,000.

[The following material was received for the record:]

NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION

INDUSTRY ESTIMATES OF COST OF "121 BRAKES" (1975) INCLUDING WEIGHT DATA

Type of vehicle	4 by 2 truck	4 by 2 truck	6 by 4 truck	School bus	Urban and intercity bus	Trailers
Vehicle class	6	7	8			
GVW (pounds)	18,501–26,000	26,001–33,000	[1]	20,000–25,000		
Number of axles	2	2	3	2	2, 3	1, 2
FMVSS 121 price	$1,130	$1,130	[2] $1,670–$2,085	$1,350	$1,500	[3] $350–$450
Annual volume [4]	18,000	37,000	145,000	16,000	8,000	140,000
Weight increase (pounds)	350–350	260–400	260–500	350	400	130
Annual cost (million)	$20	$42	$273	$22	$12	[5] $59

[1] Over 33,000.
[2] $1,670 figure is for vehicle with 9,000 and 12,000 front axle.
$2,085 figure is for vehicle with 16 000 front axle.
[3] $350 figure is for a single axle trailer, $450 for a tandem.
[4] Estimates based on 1973 domestic sales.
[5] A 25 percent–75 percent volume split was used single versus tandem axle trailers.

Note: Total "worst case" annual cost increment; $428,000,000.

[From Automotive News, Feb. 2, 1976]

MAKERS PRODUCING TRUCKS WITH AND WITHOUT ANTILOCK

(By Jack Walsh)

Major manufacturers of heavy trucks last week were building units with and without the antilock portion of the controversial FMVSS 121 stopping requirements for vehicles equipped with air brakes.

Deletion of the electronic equipment designed to prevent wheel lockup in panic stops is permissible under a 60-day stay of enforcement of 121 requirements ordered by the U.S. Court of Appeals in San Francisco Feb. 16.

Following suspension of the standard, Solicitor General Robert H. Bork asked the U.S. Supreme Court to vacate the stay, which could continue indefinitely.

Although the truck builders now are free to delete the antiskid equipment, some customers have insisted that their vehicles have the complete 121 system.

International Harvester, Mack Trucks, Inc., Ford Motor Co. and White Motor Corp. said they are building both types of vehicles at the request of customers.

General Motors, however, will be producing only 121 trucks until March 1. On that date, it will begin offering both types of vehicles. The company would not elaborate, but apparently it will take almost a month to adapt the production schedule to both 121 and modified 121 units.

Manufacturers have warned customers who want trucks without the antiskid devices that they may have to accept units with the complete 121 system if their vehicles are not completed before the suspension period ends.

Essentially, the heavy-truck builders are removing the wheel sensors and the computers on each axle of tandem and single rear-axle vehicles, and using smaller front-axle air-brake chambers, or, in some cases, eliminating front brakes.

Savings to the customer as a result of the deletion of this equipment varies from company to company, with estimates ranging from $450 to $1,000 depending on the extent of modification and type of vehicle.

Apparently, the only heavy-truck manufacturers able to produce a true pre-121 truck at this time are Kenworth and Peterbilt, divisions of PACCAR, Inc., one of three petitioners in the suit to force NHTSA and the Transportation Department to abandon 121.

PACCAR reportedly had an inventory of pre-121 components when 121 became effective March 1, 1975, and has been using the equipment on trucks built for the Canadian and export markets.

Since most manufacturers have ample antilock inventories, production of these devices by the major suppliers to heavy-truck producers has either been halted or sharply curtailed.

Kelsey-Hayes Co. said it had intended to shut down its plant, but has continued with a skeleton force after some customers said they would need the equipment. Eaton Corp., however, said it has suspended production.

There is some question as to whether the antilock systems can be removed from or disconnected on 121 trucks in dealer hands or units on the road.

According to NADA's American Truck Division, which called the suspension "a very welcome step in the right direction," the Transportation Department's initial view is that manufacturers, dealers and operators cannot tamper with 121 trucks built prior to Feb. 16.

Some manufacturers say that unless a person is thoroughly familiar with the system, a great safety hazard could result in attempting to remove or disconnect the devices without depowering the front brakes.

Meanwhile, members of the American Trucking Assns.' Safety Committee on Research and Environment, manufacturer representatives and officials of the Transportation Department will meet in Detroit Feb. 10–11 to see, as one executive said, "if we can arrive at a (121) standard we can live with."

"It's a good system and requires only a few modifications to make it workable," he added.

Mr. GREGORY. Now, maybe we are looking at apples and oranges. We are trying to sort this out, but this will give you some idea of the problems that I think the manufacturers themselves face in making their cost estimates, and which we must be very alert to.

So, rather than indicting everybody for putting in false figures, I think many times the early figures are not very well known and they will, I think, tend quite naturally to be a bit inflated on the "safe side."

I think we all get smarter as we go along.

Mr. MAGUIRE. On the unsafe side.

Mr. GREGORY. I will accept that editorial comment.

Mr. MAGUIRE. Thank you, Mr. Chairman.

Mr. MOSS. Mr. Scheuer.

Mr. SCHEUER. Thank you, Mr. Chairman.

SLOWDOWN IN NHTSA RULEMAKING

Dr. Gregory, I, too, wish to express my sorrow that you are leaving. You performed a noteworthy service during your years of service. There seems to be a depressing trend downward in the vigor with which NHTSA is prosecuting the public interest and issuing new rules, for example. New vehicle standard rules have declined at an alarming rate. You had 29 of them in the period from 1966 to 1969. In 1971 and 1972 you had nine; in 1972 and 1973 you had eight. In 1974 and 1975 you had one.

Is this sending us a signal of some kind of benign neglect, to use the words of a well-known American commentator?

Mr. GREGORY. Mr. Scheuer, I think the signal is not that NHTSA is not in any way going forward with its statutory requirements and its dedication.

As I indicated early in the hearing, I think we are getting into a posture of more complex rules which require longer, more sophisticated analysis. I think in all seriousness that many of the amendments which are not listed here, many of the amendments to the original

standards, were actually more important to safety than the standards as originally issued.

Certainly, I don't want to be dramatic about this but Mr. Carter was kind enough to bring me the computer printout of all the regulations and changes, important changes, many of them, in the standards.

If I may, if you want to pursue this a little bit further, so that we might indicate the importance of some of these amendments, I would be happy to.

Mr. SCHEUER. Let me ask you, does this diminution, this rather sharp turn downward in the number of new vehicle standards indicate to you that there is either a diminishing rate of interest or an already low rate of interest in prosecuting these new rules and new safety standards on the part of the administration?

Mr. GREGORY. In all honesty as I have already indicated, no one has come to me and said slow it down.

Mr. SCHEUER. I understand that nobody has said to you *in hace verba* slow it down. Somebody in that administration once said, "Don't listen to what we say, watch what we do."

In terms of actual support for your work, have you the feeling that they are vigorously encouraging you and supporting you on a day-to-day basis in the prosecution of the promulgation of new safety standards?

Mr. GREGORY. I must honestly say, in my contacts no one has come over, and just as they have not said slow down, they have not come over and said you have to do this as far as pushing something ahead. I have to put that in the docket as well.

Mr. SCHEUER. Have you had any encouragement that the general work you are doing sits with favor in their eyes?

Mr. GREGORY. I would hope so.

Mr. SCHEUER. I am not asking you what your personal hopes are. I am asking you what kind of signals you have been getting from the executive branch. The actual product seems to be diminishing sharply in terms of output in the safety area. What I am asking you is, what is your perception—not your hope, but what is your perception—of the support you have been getting, not perhaps by word, but by all the indices which you know count more than words?

What kind of tangible, expressed support are you getting by word or deed or act from the executive branch? And is it diminishing?

Mr. GREGORY. Let me take a couple of minutes to tell you my experiences. First of all, I think we have to go by the budget, by the funds that we are given. I think that has been very satisfactory in my eyes.

Indeed, our budget has increased, I believe, each year that I have been here.

Second, former Secretary Brinegar's instructions to me were very clear. He said, "This is an important program. Go down there and put it together and move."

Secretary Coleman has been extremely interested in our projects. He is, if I may use the word, prosafety. One of the things that he has constantly told me and other members of our department, "We have the law and the law directs us to move."

So I can honestly say from the standpoint of budget, from the encouragement I have gotten from my immediate superiors, that no

damper has been put on our programs. Indeed, I am gratified to say, as an example, that Secretary Coleman has stood with me firmly in the prosecution of airbrake standard 121. He is extremely interested in that regulation and is pushing for it, as well as for resolution of the restraint system issue. I honestly can say that I have his backing.

Mr. SCHEUER. In other words, you don't feel, in the words of John Ehrlichman, that you have been left to twist slowly, and slowly in the wind?

Mr. GREGORY. In no way, sir. To carry the thought further, that was not a part of my decision to leave the Agency.

MANDATORY SEATBELT USE

Mr. SCHEUER. Right. You have made yourself clear on that.

I note that NHTSA has issued perhaps 19 or more safety program standards, highway safety standards covering motorcycle helmets, vehicle inspection, and so forth, but they have never issued a highway safety program standard on mandatory seatbelt use.

I have put in a bill to do that, H.R. 10744. I just got back from Australia and New Zealand. In Australia the rate of seatbelt use went from 25 percent to 85 percent when they installed similar legislation. Their deaths dropped by 25 percent, and their serious accidents dropped by about 35 percent.

We estimate that if our 29 percent seatbelt use average went up to roughly 80 percent we would save, and I believe these are NHTSA figures, over 13,000 lives and just under $13 billion.

Now, this is a lot of money and a lot of lives. In addition, we are now moving toward a national health insurance program, and with such a program virtually all accident and death costs are socialized, are public costs.

The cost-benefit ratio here is infinite because the equipment is already mandated and installed. The equipment is lying flat on the seats of those cars. It seems to me that if we have a national policy expressed by the Congress that seatbelts ought to be installed, then it would seem logical, it would almost behoove us to issue some kind of reasonable and effective legislation encouraging, if not mandating use. I wonder why you have not done that?

Mr. GREGORY. I think that up to now the actions by our Agency, and by the Congress by way of incentives, have been to allow each State to make that decision.

Mr. SCHEUER. Are there any States that have mandated the use of seatbelts?

Mr. GREGORY. The only jurisdiction within the United States which has done so is Puerto Rico. I can report to you, at least from the latest figures that I have received secondhand, that Puerto Rico moved from somewhat less than 10 percent in seatbelt usage to about between 20 and 30 percent at the present. So that it is effective although it is indeed slow going.

I have been extremely discouraged by the States' inaction because all of these figures that you have cited are well known. Indeed, I think you are high on your estimate of present usage.

Mr. SCHEUER. You think the 29 percent is high?

Mr. GREGORY. Yes.

Mr. SCHEUER. What is your estimate of present usage?

Mr. GREGORY. It would fall below 20 percent. As a matter of fact, in our most recent analysis, and we have been comparing the effectiveness of various passive restraints and active restraints, the figure you used of about 80 percent is approximately correct.

In other words, if we could reach the 70 to 80 percent wearing rate, with the good comfortable belts that are beginning to come out, the number of lives saved would equate roughly to that calculated for, at least two different passive restraint systems. You are entirely correct, that is the number, no matter who does the analyses, friend or foe of the passive restraints. We have saved nearly 10,000 lives a year as a result of the 55-mile-per-hour national speed limit during the last 2 years, and the next big, most significant improvement in the fatality picture on the highways, must come through occupant restraint, either active or passive.

Mr. SCHEUER. How long have you been disappointed with the States' performance in mandating occupant restraints?

Mr. GREGORY. I was disappointed all during 1975. I announced in October 1975 that I was putting out a standard which would, at least, demand that the States have a positive program on belt wearing, to increase seatbelt use.

Mr. SCHEUER. This is what I am talking about. Have you promulgated such a requirement?

Mr. GREGORY. I have not because I have been revising my thoughts. You will probably see within the next month or two the results of that thinking.

Mr. SCHEUER. Will it include some kind of penalty for States that don't have a mandatory-use requirement?

Mr. GREGORY. Under the legislation as it presently exists, although it may be changed as a result of legislation now before the Congress, we are empowered to take away safety money and up to 10 percent construction funds if a State does not have an approved safety program.

We tried that with motorcycle helmets, Mr. Scheuer.

Mr. SCHEUER. How did it work?

Mr. GREGORY. What happened was that each House of Congress introduced a measure, which is now a part of both Senate and House versions of the Highway Act of 1975, providing that a State would not be sanctioned if it did not have a motorcycle helmet requirement.

It gives me pause as to the change in the attitude of the Congress, from the original intent of the Highway Safety Act of 1966.

Mr. SCHEUER. I personally think this latest action was a mistake on the part of the Congress. I presume, though, that many States have the motorcycle helmet requirement?

Mr. GREGORY. 47 States at this time. I would like to think that I was the first one to have the guts to try this sanction.

Mr. SCHEUER. I congratulate you for having the guts to do so. Since you have the power and jurisdiction to do it on mandating seatbelt use, why don't you use the authority that the Congress gave you? Why do you have to speculate on what the mood is today?

Mr. GREGORY. First, we have to have a standard, and I assure you that is now in the mill.

Mr. SCHEUER. What kind of standard? The seatbelts are there. We have mandated seatbelts.

Mr. GREGORY. It will be a standard relating to seatbelt use.

Mr. SCHEUER. I congratulate you. Have you announced any terminal date for your departure from your present responsibilities?

Mr. GREGORY. No. The President was very gracious in his remarks and asked me to stay on until a successor was appointed.

Mr. SCHEUER. Will it be your intention to issue this rule on seatbelts before you leave?

Mr. GREGORY. I think that is entirely possible. It will be related to safety belt use. I think we can issue it in reasonably good fashion.

Mr. SCHEUER. I am talking about penalties for States that don't adopt mandatory seatbelt use requirements.

Mr. GREGORY. The penalties are already provided in the legislation. We must base our judgment on whether the States are following up on the standards.

Mr. SCHEUER. You intend to prosecute that vigorously before you leave?

Mr. GREGORY. I stand on my record with respect to motorcycle helmets.

Mr. SCHEUER. Yes, and that is a credible record. Do you expect to get full cooperation and support from the executive branch?

Mr. GREGORY. I wouldn't know why not.

Mr. SCHEUER. You have no reason to believe you won't?

Mr. GREGORY. No.

Mr. SCHEUER. I appreciate your testimony very much. I am going to take the liberty of sending you my bill and getting your reaction. I hope it won't be necessary for me to push it further. I hope you will make my bill a theoretical matter.

Mr. Chairman, I would like at this point to ask unanimous consent to insert in the record a very brief statement I made to my colleagues on this committee when I introduced my bill mandating seatbelt use.

I want to thank the witness for his testimony.

Mr. MOSS. Under the previously agreed upon unanimous consent, the material will be placed in the record at this point.

[The material referred to follows:]

CONGRESS OF THE UNITED STATES,
HOUSE OF REPRESENTATIVES,
Washington, D.C., November 16, 1975.

DEAR COLLEAGUE: In recent days, those responsible for protecting the President of the United States have agonized over the adequacy of the security measures they employ.

Yet on October 15, when the President's limousine was struck by another car in Hartford, Connecticut, the President had failed to perform a simple act to protect his own life—buckle his safety belt.

I have introduced a bill to require the states, under penalty of a 10 per cent reduction in Federal-aid highway funds, to enact legislation making the use of safety belts mandatory for all citizens at all times, subject to certain state-determined exemptions for reasons of physical or mental infirmity, occupation, or body size. Traffic citations, which would carry fines of between $10 and $25, would be issued for violations of such laws.

The National Highway Traffic Safety Administration (NHTSA), an arm of the Department of Transportation, estimates that in 1974, 13,530 deaths and 1,260,000 serious injuries could have been avoided, as well as more than $12 billion saved, if 80 per cent of all motorists wore safety belts. And President Ford

declared one year ago, "I give my strongest recommendation that all Americans follow the sound advice which tells us to 'buckle up for safety.'"

In spite of this "strongest recommendation," President Ford himself has joined the more than 70 per cent of the American people who do not regularly wear their safety belts.

The use of safety belts already installed in passenger cars constitutes the single most cost-effective measure for reducing fatalities and injuries in motor vehicle crashes. No one can dispute the efficacy of safety belts in preventing injury and death in automobile accidents, and since the necessary safety equipment is already installed, not one additional dollar need be spent on this invaluable means of preventive medicine.

Health care costs are soaring into the stratosphere. In 1975 alone, these costs account for $120 bilion, or 8 per cent of our total GNP. We are presently moving toward funding a national health program, which inevitably will give further impetus to these costs. At such a critical time, the Congress and the American taxpayer should be particularly conscious of—and adamantly opposed to—vast, needless, and clearly avoidable expenditures on claims for health care, lost work or death. No taxpayer should be forced to bear the costs of another's gross negligence.

The importance of wearing safety belts is also underscored by the recent trend toward the manufacturing of smaller, lighter weight vehicles which are substantially less able to withstand collision impacts than the larger cars which comprise the majority of the present American fleet.

NHTSA estimates that such a shift to smaller cars, resulting from the tremendous increase in the price of gasoline as well as from energy and clean air legislation presently before the Congress, could lead to an increase of up to 25 per cent in the rate of serious injury and death. As we conserve our energy resources, surely we have a moral obligation to consider the precious human resources which will inevitably be lost if compensatory measures are not taken.

Demonstrably, the people of this country do not voluntarily "buckle up." While the states have evidenced a clear inability to pass safety belt legislation on their own, every 25 seconds one American will be needlessly injured on our nation's roads because he was not wearing his safety belt. One American will be killed unnecessarily every 38 minutes.

To fail to pass legislation which would immediately prevent the tragic waste of so many lives and dollars, and at no expense, would be a tragedy in itself, and I urge your support for H.R. 10744.

If you wish to cosponsor this bill, or would like any further information, please contact Dick Osman at X 55471.

With every warm best wish,

Yours,

JAMES H. SCHEUER, M.C.

Mr. Moss. Mr. Wunder?

AIR BAGS

Mr. WUNDER. Thank you, Mr. Chairman.

Dr. Gregory, I would like to pursue for a moment the question on the airbags, a step beyond what Mr. Collins took it.

Can you tell me how many deployments there have been with the 10,000 Buick, Oldsmobiles, and Cadillacs?

Dr. GREGORY. With your permission, I will ask Mr. Carter to reply, or Dr. Mannella. It is of the order of 60 or 70.

Dr. MANNELLA. I will give you the latest figure on that. As of February 20, there were 90 deployments, 84 of them in a crash mode.

Mr. WUNDER. In those 90, do you have any records that would indicate the number or product liability suits that were brought as a result of deployment?

Dr. MANNELLA. I have no information on that.

Mr. WUNDER. Is there any—is there a possibility that you could acquire that information?

Mr. Gregory. We can obtain the information directly from the General Motors Corp.

Mr. Wunder. I spoke to them yesterday. They tell me that there are four that have been brought and numerous others under consideration, the allegation being improper functioning of the airbag in its deployment.

Have you heard any information about these suits?

Mr. Gregory. Outside of reading about several of them in the paper, I have no information. Perhaps our legal counsel may know of them. I really do not know what the basis of the suits has been nor in reading could I readily determine the basis.

Mr. Berndt perhaps may be able to add something.

Mr. Berndt. I don't know of the suits but I am sure we can get the information.

Mr. Wunder. Mr. Chairman, under the previously agreed upon unanimous consent, I wonder if we could have the record held at this time to accept the data that the general counsel says he can supply on the number of suits.

Mr. Moss. Yes, indeed.

[The following letters were received for the record.]

U.S. Department of Transportation,
National Highway Traffic Safety Administration,
Washington, D.C., April 8, 1976.

Hon. John E. Moss,
Chairman, Subcommittee on Oversight and Investigations, Committee on Interstate and Foreign Commerce, House of Representatives, Washington, D.C.

Dear Mr. Moss: We have received from the General Motors Corporation information relating to the number of product liability legal actions arising from airbag malfunctions and can supply this information to you. The General Motors Corporation has informed us that five product liability cases arising from airbag malfunctions have been filed against them. In three of these cases, it was alleged that the airbag failed to deploy. In the fourth case, it was alleged that the airbag deployed without warning. In the fifth case, it was alleged that the airbag "malfunctioned."

Please note that the General Motors Corporation has requested that the National Highway Traffic Safety Administration afford this information confidential treatment, although General Motors did not object to the release of the information to the Subcommittee.

This completes our response to your letter of March 3, 1976. We hope that the information we have supplied will assist the Subcommittee.

Sincerely,

Frank Berndt,
Acting Chief Counsel.

U.S. Department of Transportation,
National Highway Traffic Safety Administration,
Washington, D.C., June 3, 1976.

Hon. John E. Moss,
Chairman, Subcommittee on Oversight and Investigations, Committee on Interstate and Foreign Commerce, House of Representatives, Washington, D.C.

Dear Mr. Moss: This is in further response to our letter of April 8, 1976, in which we provided you with information relating to the five product liability legal actions filed against the General Motors Corporation in which it was alleged that an airbag occupant restraint system had malfunctioned. The General Motors Corporation has informed us that an additional two such actions have been recently filed. In one case, it was alleged that the "airbag safety system was designed, manufactured and installed in such a defective, negligent and improper manner that said airbag system was directly responsible for the injuries

which the Plaintiff sustained after impact of her vehicle." In the other case, it was alleged that the airbag failed to deploy.

We hope that this information aids your inquiry.

Sincerely,

FRANK BERNDT,
Acting Chief Counsel.

Mr. WUNDER. Dr. Gregory or Mr. Carter, I wonder if you can tell me what are the costs to replace an airbag once it is deployed?

Mr. GREGORY. We have a recent estimate. Mr. Carter, I think, is best equipped to answer that question.

Mr. CARTER. As far as the replacement cost, Mr. Wunder, I think you would have to make some assumption as to the number of vehicles you had out there.

For example, at the present time I think $325 is quoted for the GM system. With the level of production that they have that is indeed a very low figure.

If you had them in mass production, then the replacement cost would be caught up in the same type of thing as the replacement parts business. I would not want to try to project those costs.

Mr. WUNDER. The $325 figure is the cost of the airbag, not the cost of replacement, is that correct?

Mr. CARTER. I am sorry.

Mr. WUNDER. The $325 figure that you used was the cost of the airbag as offered by General Motors as an option, and not the replacement cost once it has been deployed.

Mr. CARTER. You say it is not the replacement cost?

Mr. WUNDER. Yes, sir.

Mr. CARTER. Indeed not.

Mr. WUNDER. Do you have a figure on what the replacement cost would be on what has been deployed.

Mr. CARTER. No, I do not have that figure. My point is that once you get it out there and should you get these in mass production, then it would be in the same category as replacement parts.

Some of these have a markup of, I don't know, there are markup rates all over the board. That would have to be determined. I would not want to speculate on what the figure might be.

Mr. WUNDER. In pursuing that point about mass production, do you have any estimate as to how long it would take to have airbags in mass production?

Say you imposed the standard today, how long would it take the manufacturers to produce a sufficient number of airbags to place them on all cars?

Mr. CARTER. The estimate supplied by the industry which probably are reasonable, normally range from 30 to 36 months. In other words, once a requirement would be established, it would take them 30 to 36 months to get everything ready to put them on 100 percent of the cars being built.

Mr. WUNDER. So 30 to 36 months would take us to 1979. How many cars are replaced each year? Do you have a figure on that?

Mr. CARTER. The average life of a car, Mr. Wunder, is estimated to be about 10 years. Actually, the replacement rate is normally about 10 percent a year for the first 6 years. Then the rate begins to de-

crease. As I recall, at the end of 10 years, 90 percent of the vehicles are replaced. It takes 15 to 16 years to approach 100 percent. Those figures are approximate.

Mr. WUNDER. To get them on all cars, it would be 1995 according to those figures?

Mr. CARTER. It would take about 10 years from introduction to have them on something like 90 or a little bit higher percentage of the cars.

Mr. WUNDER. 1989?

Mr. CARTER. That is right.

Mr. WUNDER. Is it true that General Motors is going to discontinue offering airbags as an option on the 1977 year models?

Mr. GREGORY. It is my understanding they have done so already.

Mr. WUNDER. Do you have any indication why they dropped offering the airbags as an option?

Mr. GREGORY. I guess we can give you the reason.

Mr. CARTER. I think you should ask General Motors this question and not us. However, as I understand it, the big cars that are now offered are being totally redesigned for 1977 model year.

It is my understanding that the question arose whether dashes for those vehicles should be designed to accept air cushions. I understand that a trade-off study was done anticipating a possible requirement for airbags and some judgments had to be made on the part of the company as to what the earliest possible date would be.

Then a cost trade-off study was conducted as to whether it would be cheaper to design the dashes not to accept air bags and redesign them to the extent necessary later, or design them to accept airbags. It was cheaper to design them not to accept airbags.

So it is my understanding, but again I am not sure of this, we have no official data, that the dashes simply will not be designed to accept an airbag in those cars in the 1977 and subsequent model years.

Mr. Moss. The Chair would like to make this observation. That would not be particularly relevant in any event. In 1956 Ford offered a safety package. This was prior to the time that we mandated, for example, seatbelts. We had to go through the process first of requiring seatbelts for the Federal fleet as an inducement to getting the floor bolts in so that they could be attached to any car.

Ford withdrew the safety package because of a lack of public interest. So, the fact that General Motors may or may not continue the passive restraint system in their 1977 cars has no relevance to the effectiveness of the system nor to its probable lifesaving capability, should it finally be mandated either directly by the Congress or through the promulgation of a regulation by the National Highway Traffic Safety Administration.

Thank you, Mr. Wunder.

EX PARTE CONTACTS

Mr. WUNDER. Thank you, Mr. Chairman.

Dr. Gregory, on another subject, I was wondering if NHTSA is taking any steps to overcome or preclude the dangers that arise from ex parte contacts within the agency?

Have you issued any regulations or directives?

Mr. GREGORY. I am in the process of doing just that although I think the record will show in the information we have supplied to the committee that within about 10 days after I arrived at the agency, I issued a directive in which I discussed the way I would conduct my personal business and how we would operate in the office and I instructed all employees to do likewise.

That can be entered in the record if you so desire.

Mr. WUNDER. Could we do that under the previously accepted unanimous consent?

Mr. MOSS. The item referred to will be placed in the record at this point.

[The material referred to follows:]

POLICY GUIDANCE—NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATOR

This is to set down in writing my position regarding several matters which I understand to be consistent with policies established in the past:

1. Business meetings relating to regulatory or enforcement matters between NHTSA representatives and industry representatives, consumer groups, or other members of the public should be conducted on NHTSA premises as a general rule. There will, of course, be situations where this rule cannot be complied with. Regardless of where the meeting is held, you should attempt to have another member of NHTSA accompany you and, shortly thereafter, you shall in all cases prepare a memo for the record summarizing what was discussed.

2. It will be my practice, at meetings held in my office with industry representatives, consumer representatives, or other members of the public, particularly when such meetings relate to regulatory, enforcement or policy matters to include the appropriate NHTSA program official and any staff member as may be necessary to aid in and witness the discussion.

3. It is my view that decision-making on policy matters should not be delegated below the Associate Administrator level. Counsel should, of course, be consulted beforehand in exercising such delegated authority.

I urge each of you to make sure that these policies are well understood within your organizations. I am confident that all parties interested in the mission of NHTSA will understand and appreciate the reasonableness of these policies as well.

JAMES B. GREGORY.

Mr. WUNDER. Dr. Gregory, I was wondering to what extent you made efforts to increase public participation in your activity?

PUBLIC ACCEPTANCE OF REGULATION

Mr. GREGORY. We have tried over the time I have been there, and it is a difficult thing to get public participation. We have to identify who the public are. Also, it is very difficult to get public participation in complex technical issues.

However, we have made a valiant try, and at times we have stimulated public interest. On widely advertised, controversial issues such as the passive restraint and the so-called airbags, I do get letters from private citizens.

I did get letters from private citizens on the interlock. This was something they were experiencing. The airbag question has been out in the public enough and editorialized enough to arouse interest. I have not yet received one letter that I can think of, from an individual citizen who thinks much of the airbag.

Whether you should credit this to the editorializing or what he has heard from his neighbor, I am not sure. However, this signals to me a lack of understanding; it is obvious that we as a government agency are not really involving the public as much as we could.

I think that in the case of the interlock, had the whole preparation been better, had our communications been better, had the industry itself, along with government and the public sector been involved earlier or done a better job, we would probably have had a different result.

If I may, I would like to go on the record that despite the things that were said about the interlock, when everything abated and equilibrium was restored in the interlock use, we had on the order of 40 percent use of not only their lap belts, but shoulder belts as well. This is essentially twice the lap belt and eight times the normal shoulder belt wearing rate. We were saving lives.

Although I have never spoken out directly on the interlock because it was a fait accompli, I want to go on record and say I did not act to remove the interlock. Lives were being saved and that was my job, as I saw it by law. I want to go on record as saying that I was never encouraged to remove the interlock, and as far as I was concerned I was fully supported by the administration in that.

I think that should be known at this time.

I think we would have had a different result had the public been prepared and understood it. Also, I think we would have had better results if the designs of the interlock had been better, and if the belts and equipment functioned better.

But, this public involvement and acceptance, is something that we must keep in mind during the preparation for new programs, or we will not succeed.

Many good ideas, if not thoroughly looked at, and thoroughly planned, can be shot down through lack of public acceptance, through lack of congressional understanding, through lack of administrative understanding. Therefore, I say that public involvement is important.

I think that if the public perceived what we were trying to do in shortening the stopping distance of trucks, we would have more support on standard 121. There are millions of drivers out there who have felt threatened at one time or another by large trucks on the highway. If they perceived what we are trying to do in shortening the stopping distance in emergency situations, and curtailing fishtailing and jackknifing, I think the public might have gotten involved in and supported 121.

But despite editorials fairly late in the game, I could feel practically no public interest. As a matter of fact, I was rather surprised that we did not hear voices raised at least from some of the public safety interests about this item, technically complex though it was.

I am not critical. I am just saying that this kind of public involvement in important issues is difficult to achieve. If we had maintained the stringency of standard 121, ultimately with the familiarity which breeds confidence, we would have been able to improve safety in the long run to the great benefit of many many people on the highways.

Mr. WUNDER. Thank you, Dr. Gregory. Thank you, Mr. Chairman.

Mr. MOSS. Dr. Gregory, on this matter of interlock, is it quite possible that the failure to have the public involved was the speed with

which the determination was made to go the interlock route rather than an alternative route?

Let me make it very clear, Doctor, I know exactly what happened on the interlock. That was not your Agency's proposed ideal solution. That was the one that was ordered after a meeting at the White House, not under President Ford, but under President Nixon.

That was the idea of primarily Ford Motor Co., so that we can talk in the context of the fact that I know that did take place.

You were then faced with not the ideal alternative. It did save lives, quite a number of lives. It was a very complex thing and it was thrust upon the public without advance preparation and with the very supporters of the system becoming its immediate harsh critics.

If you drove into a dealership because you had a problem, they started to take off on Federal bureaucracy even though the manufacturer had been the one who dreamed up the contraption.

I happened to take the floor of the House to fight what I considered then the ill-conceived efforts of the Congress to interfere midway and at a moment of high emotion and I got thoroughly clobbered and I had damned little help from anyone.

Mr. Gregory. Mr. Moss, I would like to go on record as saying—when I say the Congress, I have to use that word—but also I also would like to express my appreciation for the support of many Members, not only on this issue but on the recent motorcycle helmet issue.

Also I would like to say that although congressional mail in the beginning on 121 was rather critical, I am happy to see that many of your colleagues in both Houses are now very supportive and understand what was indeed a very complex issue.

So, I want at this time to say that I must discriminate between these members who support us and those who take what is, in my judgment, ill-advised action. But thank God we are still in a position to debate these things and ultimately I think the correct results will come out.

PASSIVE RESTRAINTS

Mr. Moss. I recall the hearings we had in 1975, and the hearings prior to that time in which we discussed passive restraints. "Passive restraints" does not mean necessarily airbags, does it?

Mr. Gregory. That is correct, Mr. Chairman.

As a matter of fact, in our most recent analysis that will lead to ultimate decision on this rule—which I have written you, by the way, and said I hope to have a final rule—I am pretty darn sure we will have a resolution or final rule before the August recess.

We suspect that many cars, particularly the smaller cars, will have a passive belt system. It is unfortunate that the polarizing debate on passive restraints has circled around the word airbag when it need not have done so. There are many passive restraints on cars as you know. The padded dash, the padding that kids bang into when they are in the back seats if they are not belted, the windshield, collapsible steering wheel, the collapsing characteristic of the cars themselves are passive restraints.

So, somehow we have unfortunately got polarized and confused in this. I hope that, as we develop the final resolution of the issue of

occupant restraints, I can look to all branches of Government, the private sector, and industry as well, to help us so the facts will be known.

We will do our best, Mr. Moss.

Mr. Moss. As we move, and inevitably we are going to move, to smaller, more fully efficient automobiles, it is going to have increasing importance that we have more effective passive restraint systems as a protective substitute for the weight of the typical American car of the past several decades.

Mr. Gregory. I certainly think it is true that we must make more effective use of occupant restraint. If we could get the American public to belt up on the order of 70 to 80 percent, the strictly passive restraints, as many people think of them, would not necessarily be the right answer.

Certainly you are correct with respect to the trend toward smaller cars. As the world is going now and in the interest of conserving energy the most effective measure we can take is to reduce weight. When you reduce weight you are going to go to smaller cars, and consequently by the laws of physics you are going to be surrounded by less protection.

I honestly feel that we could very well go through a safety crisis, if you will, as it becomes highly likely that you are in a small car and yet also highly likely to be hit or be involved in a crash with a large car. I see this as a definite probability, and certainly more than a definite possibility.

This safety crisis can be averted only through increased dedication to safety, and not only in the motor vehicle area, because you can only replace the fleet with safer cars at a certain rate, as Mr. Wunder pointed out. We are also going to have to rededicate ourselves at the family and community level with regard to basic highway safety.

It will be a long, hard struggle to change driving habits but we proved we can succeed. We had what I called the biggest field test in traffic safety during the last 2 years, with the 55-mile-per-hour speed limit and strict enforcement, and we moved, that when you do change habits of millions of drivers you get a beneficial effect. I think that although it is going to take a long time, we have to make an even more dedicated effort in this highway safety effort of changing drivers habits while we are making safer automobiles.

So, although we have concentrated on motor vehicles here, I think we do know that it is possible to make inroads in human factors, as well to avoid this traffic safety crisis. If you can scare people into that as a result of this statement, then maybe we can——

CONTRIBUTORY NEGLIGENCE

Mr. Moss. Maybe there is another way, Doctor. The insurance rates are going up at an alarming rate. Unless drivers and passengers start belting up and taking all precautions, the rates are going to escalate far more rapidly to the point where some of them just may not be able to have insurance.

Mr. Gregory. As you know, there have been a selected number of cases in which damages have been reduced at least as a result of the court finding that the individuals in the suit could have protected themselves better by having belts on. As a matter of fact, this was finally

put to rest I understand—I don't like to be my own chief counsel, but as I read it in a recent British journal, this question of safety belt involvement and protection was laid to rest finally in the British Court, and there is actually a formula now that if a suit is brought and belts were not used they now have a formula by which to reduce the damages.

Mr. Moss. I think it ought to be regarded as contributory negligence, and the right of recovery severely limited if they are not belted.

Mr. Gregory. I apologize for my lack of a proper term. That is the concept that I was feeling for, contributory negligence.

Mr. Moss. As one non-lawyer to another, we can tolerate that.

Mr. Maguire.

Mr. Maguire. Thank you, Mr. Chairman.

SAFETY STANDARD FOR CHILD SEATS

Dr. Gregory, we are going to have in a few minutes two other witnesses, Annemarie Shelness and Arthur Yeager will be talking to us about two standard areas: Namely, child-seating systems and school bus safety.

Because they come after you, you will not have an opportunity to respond to the thrust of their testimony, I wanted briefly to ask you to respond to it now.

Ms. Shelness in her statement on child-seating systems indicates that in early 1971 standard 213 was put out, that in the months following that, 1971–72 it became very clear that this standard was woefully inadequate as a result of various tests that were done at universities and DOT, and so on.

It was proposed in February 1974, after no action had been taken by NHTSA—well, NHTSA itself proposed in February 1974 that the standard be upgraded and that it be put into effect by October 1975. The thrust of the evidence was that a majority of the devices tested at 30 miles per hour either collapsed, thereby adding to the injury potential, or pivoted forward, allowing the dummy's head to slam into the instrument panel, and so on.

They then met with you on April 4, 1974, to urge an interim standard, because obviously——

Mr. Gregory. You are talking about a dynamic test.

Mr. Maguire. Yes, sir.

Children are being killed or injured as a result of inadequate equipment during this period of time we are talking about, 1971, 1972, 1973, 1974, 1975, and now it is 1976.

It was indicated that the permanent standard would come out by October 1975 and, therefore, they did not want to proceed with an interim standard in the intervening year and a half.

As I understand it, we have no standard yet, and that is essentially her case. Also she points out there is no issue here of manufacturer opposition which so frequently there is; the manufacturers themselves don't oppose a better standard. Indeed, they want one. What is the reason for such delay, 1971 to 1976?

Mr. Gregory. I can only speak from the time I got into it and revived the whole idea. It becomes a technical problem. I would like to have Mr. Carter respond.

Mr. Carter. Indeed the statement is accurate. We issued the notice in February 1974. We have not issued a final rule since that time. I would not completely agree with the statement that there has not been manufacturer objection.

The reason for not issuing the final rule was simply that it was our judgment that additional work had to be done on the development of the 3-year-old dummy.

Mr. Maguire. Development of what, sir?

Mr. Carter. On what we call the 3-year-old dummy. In other words, the test device for the dynamic test, what you put in the seat to actually test child restraint systems under dynamic conditions.

Mr. Maguire. In other words, the Michigan research done on this was not regarded as adequate to establish the need for a 30-mile-per-hour collapse standard.

Mr. Carter. I am familiar with the Michigan work. The Michigan work basically concluded that the current dummies were not adequate for dynamic test measurements. That was the conclusion of the Michigan study.

Mr. Maguire. So, you have to have what, a more adequate dummy that will be more easily cut up into pieces or less easily cut up into pieces before we know that the stuff that collapses on impact is not good enough for our children? Is that what you are telling me? Is that a technical answer?

Mr. Carter. I am not giving you a technical answer. I am giving you a direct answer. It is our judgment if we had proceeded with an inadequate testing device we might have had a standards delay for the same reason as in the 208 experience.

Mr. Maguire. The problem is that we have not had adequate testing procedures and methods, is that right?

Mr. Carter. Yes. I am telling you that we have not had them but we are now finalizing the development of a dummy which is necessary for the test procedure.

Mr. Maguire. It is 4 years since the Michigan studies were done.

Mr. Carter. That is correct, sir.

Mr. Maguire. Why wasn't the standard issued in October 1975 which was the very last final date that you yourself gave for the issuance of the standard?

Mr. Carter. Because it was our judgment the dummy was not adequately developed.

Mr. Maguire. When do you expect the standard to be issued after the development of adequate dummies?

Mr. Carter. It is our judgment now, sir, that the final rule on this will probably be issued in April, no later than May. We think April.

Mr. Maguire. 1976.

Mr. Carter. Yes, sir.

Mr. Maguire. I think this is an appalling record of total incompetence on the part of your agency. I think it is most astonishing you can sit here 4 years after the Michigan studies were done and talk to us about inadequate dummies.

SCHOOLBUS SAFETY STANDARDS

I wanted to ask you about Dr. Arthur Yeager's paper on school buses. I understand you have just issued a school bus standard. Is that correct?

Mr. GREGORY. Yes, that is correct.

Mr. MAGUIRE. That is supposed to be responsive to Public Law 93–492 of 1974, is that correct?

Mr. GREGORY. That is correct.

Mr. MAGUIRE. According to Dr. Yeager's analysis there were a number of categories in which action was to be taken. Emergency exits—his evaluation of what you have done is no improvement in the status quo.

Interior protection for occupants—ignored congressional mandate.

Floor strength—ignored congressional mandate.

Vehicle operating systems—failed congressional mandate.

Windows and windshield—ignored congressional mandate.

Fuel systems—failed congressional mandate.

Seating systems—poor, seat back height insufficient, requires many areas to downgrade, no seatbelt for most users.

Only on the crash worthiness of body and frame does Dr. Yeager give you a good mark.

Can you respond to that, please, and in particular with regard to ignoring congressional mandates in these areas.

Mr. GREGORY. Mr. Maguire, that is quite a bit to try to respond to here. I don't know on what basis Dr. Yeager is making these statements. We will be more than happy——

Mr. MAGUIRE. He is saying on interior protection for occupants, floor strength, windows, and windshield, that you did absolutely nothing.

Mr. GREGORY. That is not true.

Mr. MAGUIRE. Is that correct?

Mr. MOSS. I think it might be much fairer to wait until the agency has had an opportunity to analyze the testimony and if the gentleman then desires that we call the agency back for another session to respond directly to the testimony given, the Chair will make the appropriate arrangements and we will have the agency back.

I would not personally want to have to comment in depth on material of which I just became aware. I know that my colleague from New Jersey is most anxious to treat fairly with all persons in or out of Government.

Mr. MAGUIRE. I am most anxious to treat the witnesses most fairly. I have asked questions of a factual nature which I would like the gentleman to respond to at this time. If he would like later to respond to the evaluative material in the testimony then, of course, I would be more than happy. My question at the moment, which I would like answered, is, is it true or false that the standard on buses has not dealt with interior protection for occupants, floor strength, windows and windshields? That is a question of fact which the gentleman should be able to respond to.

Mr. CARTER. Mr. Maguire, I can respond to some of that. Again I don't know the details of about what they mean. I will give you a response which I consider to be speculations.

Let us take floor strength, for example. There is nothing in the standard which mentions floor strength directly. There are no requirements in there for floor strength per se. However, the standard does require a basic dynamic test in which the seats must not separate from the floor when impacted in the rear by an object of specified size. Floor strength will have to be increased to meet that standard. I am not sure about Dr. Yeager's concern or comment, but it is possible that his per-

ception did not include the total system aspect of the regulation. Many times the performance of one part of a system can be upgraded indirectly by setting a performance standard for another part of the system.

Mr. MAGUIRE. What about windows and windshields?

Mr. CARTER. I would have to wait and study his testimony.

Mr. MAGUIRE. Did you or did you not include anything on windows and windshields as standards?

Mr. CARTER. I don't think he means that per se. I am not sure what he means, Mr. Maguire.

Mr. MOSS. I assure the gentleman as the author of the school bus amendments that I am most anxious that the standards fully carry out the intent I had when I wrote them into the legislation and will cooperate with him to see that they are indeed carried out.

Mr. MAGUIRE. I think the gentleman and I will withhold further questions although I am somewhat surprised that we can't find out from the witnesses whether or not certain standards have been addressed.

Mr. MOSS. I think we have to know the basis for the evaluation by the next witness of the standard and then see where we have differences of opinion.

Mr. MAGUIRE. Thank you, Mr. Chairman.

Mr. GREGORY. We will be most happy, Mr. Chairman and Mr. Maguire, to respond in full and also provide you at a very early date with a copy of the standard and the amendments as we prepare them.

[NHTSA's response to Dr. Yeager's testimony was subsequently received for the record:]

NHTSA RESPONSE TO THE TESTIMONY OF ARTHUR YEAGER, D.D.S., PHYSICIANS FOR AUTOMOTIVE SAFETY

This paper is the NHTSA response to criticisms of NHTSA actions in the area of school bus safety made by Arthur Yeager, D.D.S. on behalf of the Physicians for Automotive Safety (PAS). The NHTSA has recently issued several Federal motor vehicle safety standards which apply solely to school buses. Standard No. 220, *School Bus Rollover Protection*, issued January 22, 1976, provides minimum performance requirements for the structural integrity of school buses in rollover situations. Standard No. 221, *School Bus Body Joint Strength*, issued January 22, 1976, relates to structural integrity as well as reducing the likelihood of injuries from sharp edges of body panels that become separated from structural components during a crash. Standard No. 222, *School Bus Passenger Seating and Crash Protection*, issued January 22, 1976, provides for restraint of school bus passengers in an accident situation, and contains minimum requirements for seat strength. In addition, certain existing standards are applicable to school buses. A list of these standards is attached. PAS has criticized these measures for allegedly failing to provide an adequate level of safety, and to respond adequately to Congress' mandate in Title III of the Motor Vehicle and Schoolbus Safety Amendments of 1974.

The NHTSA welcomes public debate on all motor vehicle safety issues, and is pleased to respond to PAS' testimony. We will respond to points in the order that PAS raised them.

(*1*) *Emergency exits.*—It was claimed that the NHTSA requirements for emergency exits found in Federal motor vehicle safety standard No. 217, *Bus Window Retention and Release*, represent no upgrading of existing practice. In addition, it was noted that while automobiles, which carry only six passengers, have two or four doors, school buses, which may carry up to one hundred passengers, have only two doors.

First, the reference to the number of doors on passenger cars was inappropriate. Convenience, not safety, dictates the number of doors on passenger cars.

It should be recognized that too many emergency exits could create potential safety hazards on a school bus in the usual, non-post-crash situation. If unsuper-

vised, children on schoolbuses are likely to play with emergency exits, thereby creating the danger the exits may open and that the children may fall from the bus. School bus drivers can monitor one or two emergency exits, but can not be expected to control a large number of such exits while still devoting sufficient attention to safe and careful driving.

PAS is correct in asserting that NHTSA is studying the use of roof hatches in school buses. However, PAS seems to assume the benefits of room hatches while not attaching sufficient weight to possible costs of hatches to safety in other areas. We know of no instance where roof hatches would have been necessary in assisting children to escape from a bus which had rolled over on its side. In addition, the effect that roof hatches will have on the structural integrity of the roof in a rollover situation is unclear. The NHTSA has not rejected using roof hatches as an emergency exit in school buses, but we feel there are a number of safety questions still unresolved concerning roof hatches.

(*2*) *Interior Protection for Occupants.*—It was asserted that this aspect of performance was ignored by NHTSA. This assertion is incorrect.

Interior protection for occupants is provided for in Standard No. 222, *School Bus Passenger Seating and Crash Protection.* This standard relies on compartmentalization through the use of well padded and well constructed seats to provide occupant protection and school buses. The standard requires that any surface of the vehicle in the head impact zone, which is the area within which a child's head would move in a crash, must be sufficiently soft to comply with minimum head form impact requirements. Any stanchions within the head impact zone will have to meet the head impact requirements. PAS does not realize that NHTSA relies on the interrelation between the restraining effect of the seats, well anchored to the floor and designed to absorb impacts, and the impact requirements for surfaces within the impact zones, to achieve improved interior protection for occupants. This reliance by NHTSA is entirely consistent with the House committee report on the Schoolbus Safety Amendments, which recognized that seating requirements were directly related to interior protection. *H.R. Rept. No. 93–1191, 93d, Cong., 2d sess. 44 (1974).* In addition, Standard No. 221, *School Bus Body Joint Strength,* which PAS has approved in their testimony, will provide protection to occupants by reducing the likelihood of injuries from sharp edges of body panels that become separated from structural components during a crash.

(*3*) *Floor strength.*—It is asserted that NHTSA has ignored the problem of floor strength in school buses. Again, this assertion is wrong. Although there is no particular standard entitled "Floor Strength," the problems attendant in inadequate floor strength are addressed in other standards. Standard No. 220, *School Bus Rollover Protection,* issued January 22, 1976, requires that each bus roof have the capability to withstand a vertical downward force equal to 1½ times the unloaded vehicle weight without crushing more than 5⅛ inches. Although the force is applied to the bus roof, the bus is supported by its frame or sills. Failure of the floor to support this force would result in more deflection than permitted, and the bus would fail the standard's requirements because of inadequate floor strength. In addition, Standard No. 222, *School Bus Passenger Seating and Crash Protection* contains requirements for force application that require sufficient floor strength to hold the seats in place. Thus, school buses must have adequate floor strength to meet a number of performance requirements. Again, PAS has failed to realize that a systemic approach to vehicle safety can require improved levels of performance for features not directly addressed by a standard.

(*4*) *Seating Systems.*—PAS claimed that the required height of the school bus seat back is inadequate, and that the NHTSA standard would cause a downgrading of present industry requirements. PAS also criticized NHTSA's failure to require seat belts for school buses. Finally, PAS criticized NHTSA's failure to provide protection for lateral impact crashes.

It should be noted that data on school bus accidents do not indicate a significant whiplash problem that would justify seat back heights comparable to those required in smaller, lighter, passenger automobiles. Therefore, the seat back height requirement was designed to contain the occupant of the seat, rather than to guard against whiplash.

The seating systems standard requires that seat backs be at least 20 inches high when measured from the seating reference point (SRP, which is roughly 4 inches above the surface on which people sit). PAS contends that seat back height should be at least 28 inches when measured from the cushion, or about

24 inches when measured from the SRP, and relies on a study done at UCLA in 1967 and 1969, to support that view.

The UCLA study upon which PAS relies is only one effort to determine the appropriate height of school bus seat backs. A more recent study, consisting of static and dynamic testing by AMF Corporation of prototype seats designed to meet the proposed requirements of the standard, was found by NHTSA to be more persuasive than the UCLA study. The data generated by the AMF study support the position that sufficient compartmentalization of occupants would be provided by a 20-inch-high seat back height requirement, measured vertically from the SRP.

The seat back height required by NHTSA would be approximately 4 inches higher than seat backs commonly offered in school buses at present. Thus, contrary to PAS' assertion, the NHTSA standard would upgrade, rather than downgrade, existing general practice. Although some school buses have been specially provided with seats having backs higher than required by the NHTSA standard, we believe that high seat backs will not result in a significantly higher level of performance.

Further, the NHTSA standard will not preclude States from imposing more stringent standards for publicly owned school buses. Section 103(d) of the National Traffic and Motor Vehicle Safety Act of 1966, provides—

> § 103. * * *
>
> (d) Whenever a Federal motor vehicle safety standard under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard. Nothing in this section shall be construed to prevent the Federal Government or the government of any State or political subdivision thereof from establishing a safety requirement applicable to motor vehicle equipment procured for its own use if such requirement imposes a higher standard of performance than that required to comply with the otherwise applicable Federal standard.

The second sentence of section 103(d) qualifies the limitation on safety regulations of general applicability, so that governmental entities are not prevented from specifying additional safety features in vehicles purchased for their own use. Thus, a State or its political subdivisions could specify a seat back height higher than 20 inches in the case of public school buses.

With respect to seat belts for school buses, it must first be recognized that no one is more familiar with the benefits of seat belts than the NHTSA. However, seat belts must be used properly to be effective. Clearly, non-use of seat belts will provide no safety benefits. Moreover, an improperly adjusted seat belt is ineffective and can be dangerous to the wearer. NHTSA did not believe that children in the largely unsupervised school bus situation would make proper use of belts.

In summary, NHTSA has determined that a passive system of occupant containment by the seating system or a restraining barrier offers the most reliable crash protection in a school bus, and has no attendant safety disadvantages from misuse.

With respect to occupant protection against lateral forces in the 23 percent of school bus accidents involving side impacts or rollovers, the commonly available means of attempting to provide additional protection in such accidents would be seat belts. However, as discussed above, NHTSA's view is that seat belts would not be properly used unless persons were hired to ride school buses and monitor seat belt use. Under Standards No. 222, seats will be strong enough so that school districts that wish to do so may attach seat belts to them and hire the necessary monitors.

(5) Crashworthiness of Body and Frame and Rollover protection.—PAS admitted that the seam strength standards is good, but claimed that the provision for rollover protection are inadequate and represent a downgrading of present practice.

Contrary to PAS' criticism, the NHTSA standard is an upgrading of existing practice.

A static load test code developed by the School Bus Body Manufacturers Association was the basis for crashworthiness testing of school buses. Those test

results indicated that a school bus body built in conformity with that industry test code was capable of sustaining forces of approximately twice the vehicle's unloaded weight, exerted in a downward vertical direction. However, the industry test code which was evaluated specified that the bus roof withstand a force equal to the vehicle's loaded weight, which is approximately 1½ times the vehicle's unloaded weight. Thus, the NHTSA standard is not downgrading of industry practice, as PAS suggests, but incorporates the same weight specification as the industry standards. The bus which was tested exceeded the weight standard because of the fact that when products are built to conform to a nominal standard, some products exceed the standard and some fall below the standard.

The NHTSA minimum standard will result in an upgrading in the roof crush resistance in school buses, since *all* school buses must be capable of meeting the NHTSA standard. This means that the manufacturer must design its vehicle to meet a higher level of performance than the minimum, to provide a compliance margin for those of its products which fall below the nominal design level.

(6) *Vehicle Operating Systems, Fuel Systems.*—Contrary to PAS' assertion, final standards exist for both brakes and fuel systems on school buses.

Federal Motor Vehicle Safety Standard No. 105–75, *Hydraulic Brake Systems*, has been amended to extend its applicability to school buses and to establish performance levels for this vehicle category. 41 FR 2391 (January 16, 1976). Federal Motor Vehicle Safety Standard No. 301, *Fuel System Integrity* has also been amended to extend its applicability to school buses. 40 FR 48352 (October 15, 1975).

(7) *Windows and Windshields.*—It is claimed that no standard has been issued to provide improvements in visibility, defrosting, and windshield wiping. Standard No. 103, *Windshield Defrosting and Defogging Systems*, which specifies requirements for windshield defrosters to provide visibility during frosting and fogging conidtions, was issued in April, 1968. Standard No. 104, *Windshield Wiping and Washing Systems*, which specifies requirements for windshield wipers and washer systems to provide improved visibility during inclement weather, was issued in April 1968. Standard No. 205, *Glazing Materials*, which specifies requirements for all glazing materials to reduce the likelihood of lacerations and occupant penetration of the windshield, was issued in 1968.

All these standards have been applicable to school buses since their issuance, and there is no indication that the standards are inadequate for school buses. Indeed, Congress recommended that performance standards for vehicle operating systems such as windshield wipers and defrosters be provided by extending existing Federal motor vehicle safety standards to school buses where feasible, if they were not already applicable. *H.R. Rept. No. 93–1191, 93d Cong. 2d sess. 44 (1974).*

Mr. Moss. Very briefly, Doctor, can you tell me when the probable issuance of a passive restraint rule or regulation might be anticipated?

Mr. Gregory. As I have written you, Mr. Moss, I believe we will be able to come out with a final rule before the August recess.

Mr. Moss. And the effective model year would be what?

Mr. Gregory. It is generally conceded by many people that it could not be before the 1980 model year which would begin in 1979.

Mr. Moss. Thank you.

Mr. Maguire. Would the gentleman yield for one further question on that?

Mr. Moss. Certainly.

Mr. Maguire. This standard has been pending since 1969, is that right?

Mr. Gregory. That is correct in a sense. I revived the whole idea in 1974.

Mr. Maguire. We are talking 1969 to 1980 model year. Now you earlier testified that the Council on Wage and Price Stability which has interjected itself in a number of respects in regard to this standard was not responsible through those interjections for any delay. I

take it from that you and your agency assume full responsibility for long delays from the 1969 to 1980 model year?

Mr. GREGORY. It is very difficult to take full responsibility for technical complexity. It would be easy for me to file a disclaimer. I honestly think it is oversimplifying to expect an agency to take the full responsibility for technical complexity, things that have to be ironed out. Certainly I will say——

Mr. MAGUIRE. The technical evidence can be coming in from now until doomsday. What we need out of you is action that is timely based on the preponderance of available evidence. It is going to safeguard the public.

At some point continued technical fiddling around and rationalizations like we have heard this morning about nonaction flies in the face of public interest, because we are talking about people's lives. I don't detect any urgency on the part of you gentlemen on this score.

I must say, Mr. Chairman, I am very unhappy with the lack of tone and urgency that I detect here this morning.

Mr. Moss. Mr. Dodge.

REGULATORY DELAY

Mr. DODGE. Thank you, Mr. Chairman.

I have one final question, but it has several parts.

Dr. Gregory, in response to this subcommittee's questionnaire in June 1975, your Agency submitted lists of its 20 oldest proceedings in three categories, the categories of standards, defects and enforcement. At this time, Mr. Chairman, I would like to request that three documents be placed in the record in this regard.

Mr. Moss. Under the previously agreed-upon unanimous consent, the material will be placed in the record at this point.

[The material referred to follows:]

NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION

20 OLDEST AGENCY PROCEEDINGS, IN THREE CATEGORIES: (A) STANDARDS, (B) COMPLIANCE INVESTIGATIONS (ENFORCEMENT), (C) DEFECTS

Question 20. (From Subcommittee Questionnaire of June 1975): By major category, list the oldest 20 agency proceedings currently before your agency by date, subject matter, and petitioner or affected party. Describe current status. List the 10 most recently promulgated agency proceedings, identifying the subject, the date of issuance, and the date the matter was initially presented for agency consideration.

Oldest (not in chronological order):

1. Date: October 11, 1967. Subject: *Hydraulic Brakes, Trucks and Buses.* Affected Parties: Truck and bus manufacturers, brake suppliers. Current Status: Truck and bus application delayed until further notice.

2. Date: October 11, 1967 (ANPRM). Subject: *Brake Linings.* Affected Parties: Automobile manufacturers, truck and bus manufacturers, brake suppliers. Current Status: Major research to be completed in 1975.

3. Date: October 11, 1967 (ANPRM). Subject: *Maximum Speed Control* (now Speedometers and Odometers). Affected Parties: Automobile manufacturers and truck and bus manufacturers. Current Status: Notice of Proposed Rulemaking in process.

4. Date: October 11, 1967 (ANPRM). Subject: *Indirect Visibility* (now Rearview Mirrors). Affected Parties: Automobile manufacturers and truck and bus manufacturers. Current Status: Second Notice of Proposed Rulemaking (NPRM) in process.

5. Date: February 25, 1970 (ANPRM). Subject: *Fields of Direct View.* Affected Parties: Automobile industry. Current Status: Second NPRM is in process.

6. Date: August 29, 1972 (NPRM). Subject: *Identification Code for Lighting Equipment.* Affected Parties: Automotive lighting equipment manufacturers. Current Status: In hold status pending completion of higher priority proceedings.

7. Date: October 25, 1972 (NPRM). Subject: Major Amendment of FMVSS 108—*Lamps, Reflective Devices,* and Associated Equipment. Affected Parties: Automobile manufacturers, truck and bus manufacturers, lighting equipment manufacturers. Current Status: Issuance of second NPRM is in hold status pending completion of an inflationary impact statement.

8. Date: November 30, 1973 (NPRM). Subject: *Rectangular Headlamps*—Extension of Time Limitation on Usage. Affected Parties: Automobile manufacturers, lighting equipment manufacturers. Current status: Final rule is in process.

9. Date: November 30, 1966.—Subject: *Occupant Protection in Interior Impact* (Federal Motor Vehicle Safety Standard (FMVSS) No. 201; Docket No. 2–1). Affected Parties: Manufacturers of all vehicle classification. Current Status: Delayed pending resolution of policy decision.

10. Date: November 30, 1966. Subject: *Fuel Tanks, Fuel Tank Filler Pipes, and Fuel Tank connections* (FMVSS No. 301; Docket No. 73–20). Affected Parties: Manufacturers of all vehicles under 10,000 pounds GVWR. Current Status: Legal draft is in preparation.

11. Date: November 30, 1966. Subject: *Impact Protection for the Driver from the Steering Control System* (FMVSS No. *203;* Docket Nos. 2¾). Affected Parties: Manufacturers of all vehicles except walk-in type vans. Current Status: Legal Draft is in preparation for NPRM.

12. Date: November 30, 1966. Subject: *Steering Control Rearward Displacement* (FMVSS No. 204; Docket No. 70–3). Affected Parties: Manufacturers of all vehicles except walk-in vans motor homes, and vehicles built in two or more stages. Current Status: Legal Draft is in preparation for NPRM.

13. Date: November 30, 1966. Subject: *Anchorage of Seats* (FMVSS No. 207; Docket No. 2–12). Affected Parties: Manufacturers of all vehicle classifications. Current Status: Engineering draft documents are being prepared. Additional tests may be required to validate new requirements.

14. Date: November 30, 1966. Subject: *Seat Belt Installations* (FMVSS No. 208; Docket No. 74–14). Affected Parties: Manufacturers of multipurpose passenger vehicles and trucks and buses weighing less than 10,000 pounds. Current Status: Amendment (Final Rule) was issued July 3, 1975.

15. Date: October 11, 1967. Subject: *Windshield Mounting* (FMVSS No. 212; Docket No. 69–29). Affected Parties: Manufacturers of all vehicle classifications. Current Status: Action withheld pending availability of further information.

16. Date: October 11, 1967. Subject: *Emergency Exits*—Buses (FMVSS No. 217; Docket No. 75–3). Affected Parties: Manufacturers of buses and van-type vehicles. Current Status: Engineering draft documents in preparation.

17. Date: October 11, 1967. Subject: *Child Restraint Systems* (FMVSS No. 213; Docket No. 74–9). Affected Parties: Equipment only, aftermarket sales. Current Status: Legal draft is in preparation.

18. Date: October 11, 1967. Subject: *Rider Protection*—Motorcycles (Docket 2–17). Affected Parties: Manufacturers of motorcycles. Current Status: Awaiting results of additional research.

19. Date: October 11, 1967. Subject: *Fire Retardant Materials for Interiors* (FMVSS No. 302; Docket No. 74–41). Affected Parties: Manufacturers of trailers, motor homes, and equipment (Campers). Current Status: Legal draft is in preparation.

20. Date: October 11, 1967. Subject: *Exterior Protrusions* (Docket No. 2–5). Affected Parties: Manufacturers of all vehicle classifications. Current Status: Awaiting results of additional research.

Key to abbreviations:

ANPRM—Advanced Notice of Proposed Rulemaking.
NPRM—Notice of Proposed Rulemaking.
FMVSS—Federal Motor Vehicle Safety Standard.

REVISED ANSWER TO QUESTION NO. 20: STATUS OF 20 OLDEST COMPLIANCE PROCEEDINGS

Number	Date file opened	File No.	Company	Violation	Status
1	January 1972	CIR 617	Tri-Way Trailers	No information, lighting.	Considering action because of failure to supply information on lighting violations.
2	February 1972	CIR 667	British Leyland	Standard 209 belts	Manufacturer testing more belt samples.
3	July 1972	CIR 733	General Motors	Standard 207 LaSabre seat adjusters.	Agency investigating.
4	September 1972	CIR 773	AMC—Jeep	Standard 207	Do.
5	October 1972	CIR 794	Mohawk Tires	High speed Standard 109.	Civil penalty notice letter being prepared.
6	November 1972	CIR 808	Rocket Trailers	Certification lighting.	Civil penalty notice letter response under evaluation.
7	do	CIR 810	Ambassador Leather Products.	Standard 209,	Will subpena resources.
8	do	CIR 814	Firestone—Senator Farm Tires.	Tire registration	Case being closed.
9	December 1972	CIR 856	Wonder State Custom Trailers.	Certification	Do.
10	do	CIR 857	Appleby Manufacturing.	do	Court action contemplated.
11	do	CIR 864	Frontier Inc	do	Agency investigating.
12	do	CIR 873	Kar-Go, Manufacturing.	do	Do.
13	do	CIR 875	Rademacher	do	Do.
14	January 1973	CIR 881	Murray Boat Trailers	do	Do.
15	December 1972	CIR 886	East Side Machine	do	Case being submitted for civil penalty consideration.
16	January 1973	CIR 892	Sterling-Salem	do	Agency investigating.
17	do	CIR 898	Long Manufacturing	do	Do.
18	do	CIR 902	Tide-Craft	do	OSE investigating.
19	do	CIR 906	Ford Motor	Standard 207	OSE reevaluating.
20	do	CIR 910	Franklin Coach	Certification	Case being closed.

DEPARTMENT OF TRANSFORTATION—NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION

CURRENT INVESTIGATIONS OF ALLEGED SAFETY RELATED DEFECTS (20 OLDEST PROCEEDINGS)

Date initiated	Manufacturer/make	Model	Year	Component	Possible problems
1. March 18, 1969	Ford	Fairlane, Mustang	1966-70	Drop-in fuel tank	Certain vents exposed to rupture by shifting luggage.
2. July 24, 1969	do	F-250	1968-69	16 by 5.5 2-piece wheel	Lock ring gutter failure.
3. September 25, 1969	General Motors (final defect determination December 19, 1974, in litigation).	All	1965-69	Quadrajet carburetor	Fuel leakage at plug, resulting in fire potential.
4. September 8, 1969	Ford (initial defect determination made March 10, 1975).	Mustang and Cougar	1968-69	Seat back pivot arm	Inboard pivot failure.
5. October 20, 1969	GM, Chrysler, AMC, and Ford	All	1965-71	Power brake vacuum check valve.	No power assist with failure of valve.
6. December 30, 1969	All manufacturers	Travel trailers	1965-70	Axles, wheels, and tires	Overloading of suspension.
7. March 20, 1970	Ford	Ford standard size, Lincoln, Mercury, and Thunderbird.	1965-69	Front lower control arm	Failure of arm at ball joint mounting area.
8. October 28, 1970	General Motors (initial defect determination made May 15, 1974).	Cadillac, Pontiac, Oldsmobile, and Buick.	1965-69	Engine mounts	Secondary effects from shearing of engine mounts.
9. December 10, 1970	Ford	Full size	1969	Ignition switch	Poor connection between harness plug and switch.
10. March 22, 1971	do	Ford, Mercury	1965-71	15 by 5.5 single-piece wheel	Bead seat failure.
11. April 5, 1971	do	Galaxie	1968-70	Front wheel spindle	Fatigue crack in heel area.
12. September 17, 1971	Ford, Chrysler, Genera Motor, and International.	School bus	Pre-1966	Hydraulic brake line	Steel hydraulic brake line failure due to corrosion.
13. December 3, 1971	General Motors	GMC and Chevrolet Pick-up	Various	15 in single-piece wheel	Bead seat failure.
14. June 8, 1972	Ford	All	1967-71	Brake master cylinder	Failure of cylinder due to corrosion.
15. June 30, 1972	Volkswagen	All	Pre-1963	Heater	Engine fume intrusion into passage compartment.
16. June 30, 1972	Ford	Ford, Mercury	1970	15 x 6.5 single-piece wheel	Disc failure.
17. August 3, 1972 (suspended November 30, 1974).	Honda	CB750, CB500, and CB450 (K3 and K4).	All	Gas tank filler cap	Becomes dislodged allowing gas to be ignited.
18. August 3, 1972	Chrysler	All "C" body	1969-72	Bulkhead electrical connector	Becomes disconnected.
19. September 13, 1972 (final direct determination made January 10, 1974, in litigation February 13, 1974).	General Motors	Cadillac	1959-60	Steering pitman arm	Fatigue failure causing loss of vehicle control.
20. October 25, 1972	do	Chevrolet Impala	1969-70	Steering wheel	Breakage at hub.

CONGRESS OF THE UNITED STATES,
HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS
OF THE COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE,
Washington, D.C., January 19, 1976.

Hon. WILLIAM T. COLEMAN, Jr.,
Secretary of Transportation,
Washington, D.C.

DEAR MR. SECRETARY: A recent Subcommittee staff review of progress in the National Highway Traffic Safety Administration toward issuing and upgrading Federal Motor Vehicle Safety Standards has identified five important rulemaking actions in which final NHTSA decisions are long overdue. Please note that these much-needed decisions are in addition to current efforts to bring the passive restraint rulemaking action to completion. We expect an announcement on passive restraints shortly and would propose that you direct NHTSA's attention to expediting these additional agency actions as soon as your efforts on passive restraints are concluded.

I would appreciate very much receiving a clear indication of your timetable for completing each of the following long-pending NHTSA rulemaking actions:

(1) Upgrading of the requirements for flammability of interior materials (FMVSS 302).

(2) Improvement in the standard on energy absorbing steering columns (FMVSS 203/204).

(3) Issuance of a standard on sharp protrusions from motor vehicles which unnecessarily multiply injuries inflicted on pedestrians, bicyclists, and motorcyclists when they are struck by these protrusions (Exterior Protrusions, Docket 2–5).

(4) Incorporation of a dynamic test requirement in the child restraint Standard (FMVSS 213).

(5) Extension of the recent upgrading of the Hydraulic Brake Standard to multipurpose passenger vehicles and lighter trucks (FMVSS 105).

Let me describe more fully the Subcommittee's concern in each of these areas, to underscore their importance as candidates for expedited action by the National Highway Traffic Safety Administration.

Flammability of interior materials

NHTSA's current standard allows interior materials which permit flames to spread at an extremely high rate. Metro officials in Washington, D.C. justify their choice of seating materials which fed the recently reported flash fires in Metro buses by asserting that these materials meet NHTSA's flammability standard. A recent study by the National Bureau of Standards confirms that these seats meet the standard. The outrageousness of a standard shown to be this weak speaks for itself. At a minimum, NHTSA should adopt the recommendations of the National Transportation Safety Board, which also studied the bus fires. The Board points out that the current standard—"requires that material be held in a horizontal position for flame propagation test purposes, yet at least half of the interior materials in a vehicle present a vertical surface. In an accident environment, those surfaces that normally would be horizontal could become vertical surfaces. Therefore the Safety Board believes that interior material should be tested in positions which produce the most adverse results."

Burn injuries and death by incineration, like school bus crashes, generate widespread public concern in addition to causing intense pain and suffering to those directly affected. NHTSA is therefore well justified in granting increased attention and priority to this rulemaking.

Impact protection for the driver from the steering control system

NHTSA has recognized for some time the need for upgrading the performance of steering columns in crashes. Studies have shown that the current standard permits columns which do not give way as they should, except when the driver strikes the column in a straight forward manner. NHTSA's own 1974 Annual Report to the Congress states that despite some improvement in injury experience from the existing standard "the steering column still ranks high as a source of injury." (p. 56) Accident investigators from Birmingham, England, reported to the Stapp Conference in Detroit in December 1974 that energy absorbing columns meeting the laboratory tests of the present standard do not perform up to expectations in the field.

NHTSA does not need further data to defend an upgrading of Standards 203 and 204. Nor should NHTSA delay thees improvements while awaiting passive restraint rulemaking. Even if a passive restraint decision is reached soon, it may nonetheless remain locked in controversy for some time.

Pedestrian impalement

The exterior protrusion rulemaking, pending now for more than seven years, is a good example of a safety standard that imposes little or no costs on industry and consumers while adding significantly to motor vehicle safety. Auto makers need only alter vehicle designs to replace sharp objects on the front surface of vehicles with less dangerous ones. A federal court jury in the District of Columbia recently handed down a verdict against the Ford Motor Company, holding Ford liable for damages inflicted by totally unnecessary sharp features on the front end of a 1968 Mercury station wagon to a motorcyclist. (*Knippen* v. *Ford*, CA 75–1892 and CA 75–2049, now on appeal by both parties.) The jury found that the sharp features caused lacerative injuries of considerable severity, in addition to the blunt injuries normally associated with collisions between vehicles and humans. The need is clear for stating the exterior protrusions safety standard in performance terms rather than by setting design specifications. However, this need does not justify a delay of seven years.

Dynamic testing of child restraints

The need for upgrading the testing requirements for child restraints was established years ago when Consumers Union, working with the University of Michigan, produced test results showing that the current standard permits dangerous and perhaps lethal child restraint designs to remain on the market. NHTSA has stated: "There is no debate over the fact that child restraints could be improved." Tests also show that reasonably-priced child restraints which offer a high level of protection are currently available. However, these products must compete with the cheap, unsafe alternatives that the current standard allows to remain on the market. Physicians for Automotive Safety, a group of professionals which monitors this field, lists at least a dozen safety devices. A standard tailored to these devices would clearly meet the need for motor vehicle safety. Now that NHTSA has selected a suitable child dummy for use in dynamic tests, the task of describing the specifications for this dummy and incorporating them in a new standard is certainly not a process which should cause further delay in upgrading this standard. Administrator Gregory, in a letter to Senator Vance Hartke dated November 14, 1974, promised "no unnecessary delay" in rulemaking on a child restrain system. The time for action on this standard has long since passed.

Extensions of the hydraulic brake standard to small trucks and vans

The benefits of NHTSA's accomplishments in upgrading FMVSS 105 have been denied to owners of pick-up trucks, vans, and other multipurpose passenger vehicles and light trucks (trucks up to 16 tons, at which point air brakes are generally substituted). In fact such vehicles are covered by no federal brake standard at all, following NHTSA's decisions to delete them from the coverage of FMVSS 105. This continuing omission is particularly unconscionable in view of the increasingly popular practice of loading vans with equipment and pick-ups with camper bodies, thus adding considerably to brake performance needs.

Similar concerns can undoubtedly be raised about other pending rulemaking actions. However, action on these standards, together with a decision on the passive restraint rulemaking, would do much to put to rest growing concern that the Administration—under the banner of regulatory reform—is seeking to slow down or terminate not only dubious forms of price and market entry regulation, but also safety regulation determined by the Congress to be vital for the protection of the public from unreasonable risks.

Thank you for your attention to this matter. We would appreciate a response by January 30, 1976.

Sincerely,

JOHN E. MOSS,
Chairman,
Oversight and Investigations Subcommittee.

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS OF THE
COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE
Washington, D.C., February 17, 1976.

Hon. WILLIAM T. COLEMAN, Jr.
Secretary of Transportation,
Washington, D.C.

DEAR MR. SECRETARY: My letter to you of January 19, 1976, seeking your timetable for completing five major National Highway Traffic Safety Administration rulemaking actions, requested a response by January 30, 1976.

We have not yet received your reply to this letter. We recognize that our request set forth a relatively brief time period for reply. However, we regard the subject matter of the letter as highly important. Your timetable for these rulemakings is an essential aspect of this Subcommittee's concern for moving NHTSA's vehicle safety program in a positive direction.

We would therefore greatly appreciate your efforts to expedite the response to this letter.

Sincerely,

JOHN E. MOSS,
Chairman, Oversight and Investigations Subcommittee.

SECRETARY OF TRANSPORTATION,
Washington, D.C., March 1, 1976.

Hon. JOHN E. MOSS,
Chairman, Oversight and Investigations Subcommittee, Committee on Interstate and Foreign Commerce, House of Representatives, Washington, D.C.

DEAR MR. MOSS: Thank you for your January 19, 1976, letter requesting a timetable for completion of action by the National Highway Traffic Safety Administration (NHTSA) on five aspects of motor vehicle safety: upgraded flammability requirements for materials used in the vehicle interior, improvement of steering column performance in crashes, establishment of an exterior protrusions standard for motor vehicle bodywork, incorporation of a dynamic test requirement in the child restraint system standard, and extension of the hydraulic brake system requirements to multipurpose passenger vehicles and light trucks. You suggest that the NHTSA be directed to expedite rulemaking in these areas, and you conclude that such action would be consistent with Congress' view that safety regulation is vital to the protection of the public from unreasonable risks. This letter also responds to your February 17, 1976, request for an expedited reply.

As it moves forward with its comprehensive regulatory reform efforts, the Department certainly recognizes the distinction between regulation which is primarily economic and that which is primarily safety. As you know, the Department has submitted a series of proposals aimed at reforming and improving the Federal regulatory climate in which our private transportation system must operate.

We also believe, however, that safety and other types of Federal regulation must be carefully examined to ensure that their costs to the taxpayer and the private sector are justified by the anticipated benefits. We are currently striving to improve our abiltiy to analyze these issues and to incorporate the results prior to any final action on new or revised Federal regulatory actions.

As a general matter, your request for a "timetable for completing" action in the five areas of rulemaking cannot be answered with complete specificity, because several actions are presently being evaluated to the degree that available accident data and causation methodology permit.

With regard to upgrading the requirements of Standard No. 302, *Flammability of Interior Materials*, the NHTSA has concluded that a more stringent limitation on burn rate of interior materials would be unjustified. Analysis of accidents (including the bus fires investigated by the National Transportation Safety Board) indicates that the current requirements of the standard are sufficiently stringent to allow evacuation by vehicle occupants. Deaths and injuries directly caused by fire are almost always attributable to fires that involve burning fuel. Since the burn rates or modes of testing interior materials do not significantly affect the intensity of these fuel-fed fires, the standard's present performance level and test procedure (4 inches per minute in a horizontal test) are calculated

to permit evacuation of a vehicle in those cases where fuel is not a factor and the burn rate can make a significant difference.

The NHTSA has granted a recent Center for Auto Safety petition to commence rulemaking to amend Standard No. 203, *Impact Protection for the Driver from the Steering Control System*, to upgrade the performance of steering columns in vehicles. Earlier proposals by the NHTSA to upgrade both Standard No. 203 and Standard No. 204, *Steering Control Rearward Displacement*, and to extend their applicability to vehicles other than passenger cars were determined to require revision and were withdrawn. While some level of minimum steering column performance is undoubtedly needed, the agency is presently evaluating as closely as possible the incidence of steering column injuries and fatalities for all vehicle types, the minimum performance levels required to prevent such injuries and fatalities, and the costs of mandating this level of performance. Because of the complexity of this process and the need to rely on incomplete accident data, we do not at this time have a schedule for action in this area.

The NHTSA is holding in abeyance its rulemaking on exterior protrusion protection until basic research is more advanced on the fundamental problems of pedestrian injuries and deaths from motor vehicles. Because the accident data indicate that the vast majority of injuries caused by motor vehicle impact into pedestrians are "blunt trauma," the agency considers that the most reasonable rulemaking action would address the "hostility" of the vehicle body as a whole and not establish arbitrary limits on sharp protrusions in the interim. The NHTSA is planning to issue a proposal for general pedestrian protection in 1979.

The NHTSA has issued a proposed amendment of Standard No. 213, *Child Seating Systems*, to incorporate dynamic testing of all child restraints in simulated frontal, lateral, and rear barrier crashes. Certain aspects of the proposal would have eliminated several of the "safe devices" referred to in your letter, and the NHTSA is undertaking revisions of the proposal to permit their continued production. Unfortunately this process may require a new proposal, but the NHTSA intends to complete specifications for a child dummy and issue either a limited rule or a new proposal not later than April 1976.

The NHTSA is planning to extend the applicability of its hydraulic brake standard for passenger cars and school buses (Standard No. 105–75) to trucks, buses and multipurpose passenger vehicles. A decision on whether to issue such an amendment will be made in April 1976.

Sincerely,

WILLIAM T. COLEMAN, Jr.

INSURANCE COMMISSIONERS URGE AUTO AIR BAGS

For immediate release

As a part of its continuing concern for major consumer affairs issues affecting the insurance-buying public, the National Association of Insurance Commissioners (NAIC) has urged the U.S. Department of Transportation and its National Highway Traffic Safety Administration (NHTSA) to finalize its standards for auto air bags automatic crash protection systems.

The professional association of the 50 states insurance directors took this action via written resolution adopted unanimously by its Executive Committee. The resolution was sent to Secretary of Transportation William T. Coleman and NHTSA Administrator James S. Gregory.

Motor Vehicle Safety Standard 208, under consideration by the Department of Transportation, would require installation of passive restraints at the earliest practicable date as standard equipment on all new automobiles sold in the United States, with the primary goal of saving lives and reducing injuries. The Commissioners pointed out that this action also could produce substantial savings for automobile insurance purchasers.

In a letter submitting the resolution to the federal government, Oregon Insurance Commissioner Lester L. Rawls, Chairman of the NAIC Executive Committee, and Nevada Commissioner Dick L. Rottman, NAIC President, said NAIC the insurance rates are necessary to compensate injured parties, but more importantly, for the protection of those persons who may be injured victims of automobile accidents.

"With the critical condition facing the (auto insurance) industry in regard to increased rates as a result of injuries and property damage, the insurance

commissioners of this country feel that they have a responsibility to the citizens of this country to urge that all safety factors be considered," Rawls and Rottman wrote.

A five-point preamble to the NAIC resolution pointed out that—

1. Some two million people are killed and injured in auto crashes yearly, causing "an intolerable level of human pain, suffering, anguish and bereavement, and billions (of dollars) in economic loss";

2. The human tolls will "substantially increase in the next ten years" because of increasing numbers of compact and sub-compact automobiles entering U.S. traffic streams in response to the national energy crisis;

3. The anticipated increased casualties "will increase the costs of automobile insurance for the American automobile" and further burden "the health care resources of our nation";

4. "Air bag passive restraint systems promise to substantially increase the protection against such highway deaths and injuries"; and

5. The Department of Transportation has proposed passive restraints "as standard equipment for 1972 model year, postponed to 1974 model year, postponed to 1976 model year, and again effectively postponed to 1978 model year, with no final standard yet issued."

In the wake of these factors, the resolution stated that the National Association of Insurance Commissioners urge the Department of Transportation to promulgate without further delay Motor Vehicle Safety Standard 208, requiring air bag passive restraint systems as standard equipment on all new automobiles for the earliest practicable model year.

* * * * * * *

NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS,

January 30, 1976.

Hon. WILLIAM T. COLEMAN,
Secretary of Transportation, Washington, D.C.

Dr. JAMES S. GREGORY,
Administrator, National Highway Traffic Safety Administration, Washington, D.C.

GENTLEMEN: As Chairman of the Executive Committee and President of the National Association of Insurance Commissioners, we take this opportunity to forward to your attention the attached resolution which has been adopted by the National Association of Insurance Commissioners.

With the critical condition facing the industry in regard to increased rates as a result of injuries and property damage, the insurance commissioners of this country feel that they have a responsibility to the citizens of this country to urge that all safety factors be considered in an attempt not only to stabilize the insurance rates that are necessary to compensate injured parties, but more importantly for the protection of those persons who may be injured victims of automobile accidents.

Yours respectfully,

LESTER L. RAWLS,
Chairman, Executive Committee, NAIC Insurance Commissioner, State of Oregon.

DICK L. ROTTMAN,
President, NAIC Insurance Commissioner, State of Nevada.

Whereas, thousands of motor vehicle occupants are killed each year and nearly two million are seriously injured causing an intolerable level of human pain, suffering, anguish, and bereavement, and billions of economic loss;

Whereas, this tragic toll of death and injury will substantially increase in the next ten years as a result of the increased use of compact and subcompact autobiles in order to meet our nation's fuel conservation goals;

Whereas, the national tragedy of death and injury on our highways and anticipated increase from the growing use of such compact and subcompact automobiles will increase the costs of automobile insurance for the American automobile and will place a heavier burden on the health care resources of our nation;

Whereas, air bag passive restraint systems promise to substantially increase the protection against such highway deaths and injuries;

Whereas, the Department of Transportation has earlier proposed passive restraints (air bags) as standard equipment for 1972 model year, postponed to 1974 model year, postponed to 1976 model year, and again effectively postponed to 1978 model year, with no final standard yet issued; Now, therefore, be it

Resolved, That the National Association of Insurance Commissioners urge the Department of Transportation to: (1) promulgate without further delay Motor Vehicle Safety Standard 208, requiring air bag passive restraint systems to be installed on all new automobiles sold in this country at the earliest practicable date; or (2) satisfactorily explain to the American public why such regulation is not adopted.

Mr. Dodge. The first document is the Agency's response to the subcommittee's June 1975 questionnaire, listing NHTSA's 20 oldest safety defect proceedings, including among others, the old chestnut of the Ford lower control arm investigation and other defect investigations; NHTSA's 20 oldest rule-making actions, including, for instance, the lack of application of the hydraulic brake standard 105 to vans and trucks, and I am sure lightweight trucks and vans; and, NHTSA's 20 oldest compliance proceedings.

As I am sure you know, about one out of every four vehicles that is sold today is a light truck of some sort, or a van. Yet we have no brake standard covering these vehicles. So we would like to introduce this into the record.

The second document is a list of the five particular rulemaking actions contained in a letter from Chairman Moss of this subcommittee to Secretary Coleman outlining the particular standards which we would hope you could turn your attention to once the 208 rulemaking is concluded.

In that regard, the third document is an indication that the insurance commissioners of the various States of the United States—hardly known for being a radical group—have recently by resolution come out in strong support of the passive restraint standard, in particular of the airbag route of meeting that standard.

I would like to ask you, Dr. Gregory, in this connection, whether you are undertaking any particular efforts to clear out any of these ancient rulemaking proceedings, many of which date back to 1966 and 1967.

Mr. Gregory. Mr. Dodge, the answer is yes. As a matter of fact throughout the defects, the enforcement area and the standards area, I think the record will show that we have made a number of critical decisions, many of which find their way to court.

On many of these cases, as you know, we have to exercise some degree of discretion in choosing the cases in which we will proceed. With respect to the defects area, we have a weekly meeting called the defects correction meeting which I chair, and which addresses the important defects issues.

We also meet frequently on the standards. If we have neglected some standard areas, it is because we have felt there is a priority in another area. As I have indicated, we probably will never have a more important decision on a standard than the one on restraint systems. If we can get the public restrained in crashes, that will probably be the single most effective step that this Agency can take within predictable time. After that the gain will be in smaller bits and pieces.

If you analyze the facts that: We have reduced by approximately 9,500 the number of fatalities in 1974 and 1975, as compared to 1973;

that we can achieve through an improved restraint situation a further reduction of 10,000 to 35,000; assume that the next steps will be in bits and pieces that may not net more than another 10,000, given today's world—it is tragic to say so, but the asymptotic line may never be lower than 20,000 to 25,000 deaths. I am sorry to say that.

LIVES POTENTIALLY SAVED BY PASSIVE RESTRAINTS

Mr. Moss. Incidentally I had intended to ask a further question.

Earlier I believe we had an ambiguity develop on the record. You indicated that you use the 10,000 figure as being the number of additional lives that could be saved.

I believe, however, Mr. Dugoff, you indicated that the people at the Council on Wage and Price Stability themselves had a figure different from that. Am I correct in that recollection?

Mr. Dugoff. I perhaps did not express my thought accurately. If I could take the time to characterize the Council's position, as I understand it, more completely, it is to the effect that the existing data base does not provide a sufficient basis to make an absolutely confident prediction of the number of lives to be saved.

They have pointed to studies conducted by experts in the field and demonstrated a very wide disparity in the predicted numbers of lives to be saved, and cited that disparity as a basis to conclude that the existing data base is inadequate.

Mr. Moss. Have those citations been supplied to this subcommittee?

Mr. Dugoff. I believe they have, sir. If not, we can supplement the record.

Mr. Moss. They will be entered into the record at this point and we will look them over. We will be interested in them and will bring the Council on Wage and Price Stability before us.

[The following information was received for the record:]

SUMMARY OF DISPARITIES IN PREDICTIONS OF LIVES POTENTIALLY SAVED BY ISSUANCE OF PASSIVE RESTRAINT STANDARD

In testimony at our 208 hearings on May 23, 1975, George Eads, Assistant Director for Government Operations and Research COWPS, cited source data from NHTSA, Economic and Science Planning, Inc., De Lorean Corporation, General Motors, and Ford. Examination of the data submitted to the 208 docket as of that date by those organizations (see citations accompanying tabulated data) reveals the following estimates of potential annual life savings attributable to a passive restraint standard (in terms of incremental savings at equilibrium, i.e., lives saved if all cars were equipped with passive restraints* less lives saved by safety belts assuming realistic rates of usage):

Source	Net lives saved [1]	Documentation from which derived
NHTSA	8,900	"Analysis of Effects of Proposed Changes to Passenger Car Requirements of FMVSS 208—First Amendment," NHTSA, December 1974.
EPS	3,000	"Review and Critique of NHTSA's Revised Restraint System Cost Benefit Analysis," Howard P. Gates, ESP, Inc., July 1975.
De Lorean	19,000	"Automotive Occupant Protective Safety Air Cushion Expenditure/Benefit Study for the Allstate Insurance Co.," De Lorean Corp., August 1975.
GM	2,700	"Comments of GMC with Respect to NHTSA Report Entitled 'Analysis of Effects of Proposed Changes to Passenger Car Requirements of FMVSS 208,'" GMC, October 1974.
Ford	3,600	"Comments of Ford Motor Co. on 'Analysis of Proposed Changes to Passenger Car Requirements of FMVSS 208,'" FoMoCo, Oct. 9, 1974.

[1] Air cushion with lap belt.

*Air cushion with lap belt.

There are three principal reasons for the disparity in the foregoing projection of benefits. These relate to the estimates of belt utilization, belt effectiveness when used, and effectiveness of the passive restraint system. Belt usage is around 20% over the current fleet of passenger cars and the several studies project this usage will range from 20%–60%. Belt effectiveness in saving lives when worn, is estimated variously at 27%–90%. Air cushion passive restraint effectiveness has been projected to span an equally large range—28% to 83%.

Mr. GREGORY. A wide variety of individuals made analyses, whether they be proponents of passive restraints or belts, or a variety of other interests, and regardless of the purpose for which they made the analyses, generally speaking, it is agreed that if we can get the great preponderance of the public restrained—adequately restrained in some way with belts or other means—then, oversimplifying it, about another 10,000 lives can be saved.

Mr. MOSS. I have the same conviction: If the Council on Wage and Price Stability feels a different data base and different figures are more reliable, I think they assume the burden of proving their figures to be more valid than yours. I will expect them to do precisely that.

Are there further questions?

Mr. DODGE. I have one further question, Mr. Chairman.

Mr. MOSS. Mr. Dodge.

FUEL ECONOMY STANDARDS

Mr. DODGE. Dr. Gregory, section 502 of the recently passed Energy Policy and Conservation Act requires that the Department of Transportation assume responsibility for issuing future fuel economy standards. We understand that some consideration is being given within the Department to assigning this task to your administration.

The regulatory reform study that this subcommittee is undertaking is assessing, among other things, the appropriateness of existing Federal regulatory mandates from the Congress. We are asking, among other things, whether the mandates are appropriate.

In that context, Dr. Gregory, can you share with the subcommittee your views on the appropriateness of assigning the development of the new fuel economy standards to NHTSA?

Mr. GREGORY. Of course there might be some concern, I suppose that responsibilities in the area of fuel economy might dilute our safety effort. Actually I feel that we have the types of people in the agency who are familiar with the automotive area and who would be quite competent to carry out any new responsibilities. Certainly we could select additional people, and with our leadership, be able to carry out any new duties.

I have espoused in the past, and I don't pretend that it is administration policy or anybody's policy except that it makes sense to me, with all of the competing forces relative to the automobile in terms of fuel economy, damagability, safety and a wide variety of other concerns, that perhaps these various aspects of performance might ultimately at some future date be dealt with in concert. Whether that is a good idea in today's climate of regulatory reform or whether it could be achieved, I do not know, but I put this out as a personal observation.

Perhaps I am less reluctant to do so because this is somewhat my valedictory but I think in the future this might be considered.

I have the idea that it might be very well to consider that what I call the S3E, or the safety, energy, economy and environmental impact of so vital a product in our society. Again I wish to state it is strictly a personal observation but with the proper dedication and proper people I think something in the future like that might make sense.

Mr. Moss. I think it is an observation that deserves very careful consideration by the subcommittee.

Mr. Dodge. I have no further questions, Mr. Chairman.

Mr. Moss. Are there further questions?

If not, I do want to thank you for your appearance. Not knowing the date of your departure I can't say whether we will have you before us again in a hearing but in any event I hold only the very best wishes for your future endeavors.

Mr. Gregory. Thank you. I appreciate that.

I want you to know my work schedule has not changed. As long as I am Administrator and the invitation is proferred, I will be here.

Mr. Moss. I would expect that. Thank you very much.

Mr. Gregory. Thank you, Mr. Chairman

Mr. Moss. At this time I would like to call Dr. Arthur Yeager, School Bus Safety Chairman, and Ms. Annemarie Shelness, executive director, Physicians for Automotive Safety, Irvington, N.J.

Dr. Yeager and Ms. Shelness, will you both rise and be sworn?

Do you solemnly swear that the testimony you are about to give this subcommittee shall be the truth, the whole truth, and nothing but the truth, so help you God?

Dr. Yeager. I do.

Ms. Shelness. I do.

Mr. Moss. Will you each identify yourselves for the hearing record?

TESTIMONY OF ANNEMARIE SHELNESS, EXECUTIVE DIRECTOR, PHYSICIANS FOR AUTOMOTIVE SAFETY; AND ARTHUR YEAGER, D.D.S., CHAIRMAN, SCHOOLBUS SAFETY, PHYSICIANS FOR AUTOMOTIVE SAFETY

Dr. Yeager. Arthur Yeager, a dentist from Westwood, N.J., chairman, Schoolbus Safety, Physicians for Automotive Safety.

Ms. Shelness. I am Annemarie Shelness, executive director of the Physicians for Automotive Safety, a New Jersey based organization, but I am actually a resident of Rye, N.Y.

Mr. Moss. Do each of you have a statement?

Dr. Yeager. Yes, we do, Mr. Chairman.

Mr. Moss. How would you like to proceed?

Dr. Yeager. Ladies before gentlemen.

Mr. Moss. Ms. Shelness, do you desire to read the statement or have the entire statement placed in the record and summarize?

Ms. Shelness. It won't take long to read. I won't read it all.

Mr. Moss. It is a matter of preference for you at this point.

Ms. Shelness. I would like to read some of it.

Mr. Moss. Without objection, the statement will be entered into the record following your summation [see p. 491].

You may proceed as you desire.

TESTIMONY OF ANNEMARIE SHELNESS

Ms. SHELNESS. Thank you.

I am here as has been pointed out regarding the failure on the part of NHTSA to issue a revision of standard 213.

CHILD RESTRAINT SYSTEMS

Although seat belts have been available as optional equipment since 1956 and become required equipment in January 1968, there was no way parents could protect their small children until April 1971, when, following a number of postponements, a standard was finally issued for "child seating systems." This excluded all devices for infants as well as children's harnesses which are covered by an inadequate specification under Motor Vehicle Safety Standard 209.

No. 213 was a vast improvement over what we had before. Until then there was no way of fastening the seats to the actual structure of the vehicle and there was no harness system to keep the child contained within the device.

Nevertheless, as has been pointed out by Mr. Maguire, the standard was soon shown to be totally inadequate.

I will skip over part of the testimony because it is known those tests were inadequate and it is also known that a meeting took place with Dr. Gregory and his staff at which were present two key figures, Arnold Siegel and Richard Stalnaker.

Mr. Siegel who is one of the country's leading safety experts did the only in-depth clinical study of injuries sustained by children in automobile collisions. These are very expensive studies but he did them under a UCLA project.

The other person, a key figure in the whole picture, is Dr. Stalnaker of the University of Michigan Highway Safety Research Institute who was actually engaged in the testing of these child restraints.

It was the opinion of the people present, that is Mr. Siegel, Dr. Stalnaker, Dr. Charles who is the co-founder and president of Physicians for Automotive Safety, Dr. Yeager and myself that an interim standard should be issued because we realized, particularly Dr. Stalnaker realized, it would take a long time to get to the optimum protection which NHTSA was trying to accomplish.

I don't want to be nasty, if that is the word, but when the meeting broke up Dr. Stalnaker said, and I am paraphrasing, to Mr. Carter who answered questions here today, "You will never get the standard out by October 1975." Mr. Carter insisted that he would. I heard here earlier that the standard is going to be out by May. I learned prior to coming here that the University of Michigan has been awarded a contract for further research into the child dummy.

The work has not yet been started, and it will take 3 to 4 months to complete. So, there is absolutely no chance in my opinion that this standard will be out in May because presumably this research would not have been undertaken unless it was needed for finalizing the standard.

The irony is that there is no opposition by the industry. I spoke to an industry spokesman again yesterday. I ascertained that with one exception all manufacturers today make devices that hopefully will meet the proposed Federal standard.

The manufacturers want a standard because they are groping in the dark right now hoping that what they have produced will meet Federal specifications. The development of these devices is extremely expensive. The tests, the dynamic testing alone is extremely expensive. So they have really gone out on a limb to produce good devices.

Yet they are forced to compete with the one or two companies that still put out the so-called junky seats. So it is very difficult for me to find any justification for what NHTSA has done or is not doing.

I should like to also say here that the only organizations that make information available to the public, who have been responsible for getting articles into magazines and so on, is our own organization and Action for Child Transportation Safety which is a citizen's group I helped to found which supplements some of the work done by PAS.

A list of manufacturers, incidentally, is attached to the testimony so that you can convince yourselves that they all make dynamically tested seats.

I have also suggested to NHTSA that the standard should now be tailored to meet the devices already on the market, already approved by the University of Michigan scientists, rather than coming out with a new standard that they would again have to meet.

It is also a matter of convenience. We do put out a pamphlet and I will give credit to NHTSA for one thing, Mr. Chairman. We have for a long time criticized their pamphlet, "What to Buy in Child Restraint Systems," because it is outdated, inadequate and gives parents no helpful information whatsoever. The Motor Vehicle Council also said that pamphlet ought to be withdrawn from circulation because parents are confused by it.

So the one thing I must give credit for, an insert has been added to that pamphlet—they are still putting it out, they have huge stocks—referring the public to Physicians for Automotive Safety for product information.

In a way, of course, they have passed the responsibility on to us now.

I also would like to touch upon education. It has been shown that parents do not secure these devices properly because they really do not understand their function. We have made a comment to the docket on child restraints that manufacturers must find some way, where the consumer cannot miss it, of drawing attention to the function the device was designed to perform. Hopefully it will be included in the standard. Some of the manufacturers are now doing it voluntarily.

When I said education I really feel that parents need to be told that their children have to be protected because an insurance institute study done recently disclosed that even parents who used belts themselves did not restrain their children. This is very difficult to understand except that there may be some misconception that the children are safe in the back seat. This is something that a lot of people still believe.

We had seatbelts in the front only in the beginning so what people interpreted from that was that the back seat is safe. Somehow we have to reach parents and obviously a small membership supported organization such as the Physicians for Automotive Safety cannot do the job alone.

With this I will complete my testimony, if the rest can be included.

[Ms. Shelness' prepared statement follows:]

PREPARED STATEMENT OF ANNEMARIE SHELNESS, EXECUTIVE DIRECTOR, PHYSICIANS FOR AUTOMOTIVE SAFETY

My name is Annemarie Shelness; I am executive director of Physicians for Automotive Safety, a 500-member organization of the medical profession. I am here today on behalf of my organization to draw this Committee's attention to a matter affecting the life and health of infants and small children. It concerns the failure on the part of NHTSA to issue a revision of MVSS No. 213, a standard that has been shown grossly inadequate in providing crash protection.

Although seat belts have been available as optional equipment since 1956 and became required equipment in January 1968, there was no way parents could protect their small children until April 1971 when, following a number of postponements, a standard was finally issued for "child seating systems." This excluded all devices for infants as well as children's harnesses. The latter are subject to some—albeit inadequate—specifications under MVSS No. 209.

There is no denying that No. 213 was a vast improvement over what we had available in the past. Major innovations included: (1) means of anchoring the device to the seat of the vehicle with a standard lap belt; (2) provision of a harness to keep the child contained within the device; and (3) head support to minimize "whiplash" injury. It was further required that the device withstand a specified gradual pulling force, a "static" test requirement employing a wooden block to simulate the child occupant—a simple lab procedure. Manufacture of the popular bail-type models that hook over the back of the car seat was no longer permitted.

The new seats did not look much sturdier than their pre-standard counterparts, and it was soon confirmed that the test procedure required by DOT's National Highway Traffic Safety Administration was, indeed, woefully inadequate. In October 1971, six months following the implementation of Standard 213, Dr. Verne Roberts, then head of the Biosciences Division of the University of Michigan Highway Safety Research Institute, the scientist in charge of the crash testing of child restraints under a government contract, felt compelled to expose the inadequacies before the final report on these tests was released by the DOT in September 1972.

Ten months later, in August 1972, the results of a series of simulated crash tests sponsored by the Consumers Union, also conducted at the Michigan research facility, drew national attention to the "shocking" shortcomings of the federal standard based on static load criteria. Of the 17 car restraints tested, all meeting government specifications, 12 were rated "not acceptable."

The Michigan research employed simulated crash tests, i.e., "dynamic" tests, which reproduce the violent, split-second forces unleashed in real-life crashes. This consists of installing a device containing a properly restrained child dummy occupant on a standard car seat which, in turn, is mounted on an impact sled. The sled is propelled at predetermined speeds into a concrete crash barrier. The event is recorded with high-speed movie cameras and appropriate parameter technology of all strategic forces that come into play. The majority of devices tested at 30 miles per hour either collapsed, thereby adding to the injury potential, or pivoted forward, allowing the dummy's head to slam into the instrument panel. Furthermore, many permitted the vehicle lap belt to dig deeply into the dummy's abdomen despite indications that such loads may exceed the child's tolerance limits.

Although the evidence showing these devices to be inadequate was overwhelming, it was not until February 1974 that NHTSA issued a proposal for upgrading test requirements. The date specified for implementation was October 1975.

On April 4, 1974 a meeting took place with Dr. James Gregory, Administrator, National Highway Traffic Safety Administration and members of his staff. Present were: Mr. Arnold Siegel, one of the country's leading auto safety experts, director of Engineering for the Trauma Research Group at the Department of Surgery UCLA School of Medicine and co-author of a clinical study "Injuries to Children in Automobile Collisions," Dr. Richard Stalnaker, the engineer in charge of crash testing of child restraints at the University of Michigan Highway Safety Research Institute, Dr. Arthur Yeager who is testifying here today, Dr. Seymour Charles, founder and president of Physicians for Automotive Safety, and myself.

At this meeting NHTSA was urged to issue an interim standard, which would merely require that devices remain intact in 30 mph frontal crashes. It was explained that doing so would eliminate from the market the majority of inferior devices without delay while specifications for optimum crash protection were being finalized.

NHTSA rejected the proposal, insisting that implementation of the revised standard would not take significantly longer than writing specifications for interim requirements. I distinctly recall a brief exchange between Dr. Stalnaker and Mr. Robert Carter as the meeting was breaking up. Dr. Stalnaker said, and I am paraphrasing, "you'll never get the Standard out by October 1975." Mr. Carter insisted he would.

October 1975 has come and gone.

I have just learned that the University of Michigan has been awarded a contract for further research on the child dummy. The work which has not yet begun, will take three to four months to complete. I leave it to you Mr. Chairman, to draw your own conclusions . . .

Even when specifications are finalized, several months are likely to elapse between the date the new standard is published and the date it goes into effect. Furthermore, inferior devices will probably remain in the stores for a long time to come in view of the fact that the Department of Transportation controls only the date of manufacture—not sale.

The irony here is that there is no opposition to the new standard—in fact the industry is more than anxious to know what the specifications will be. 13 manufacturers have developed a total of 16 good devices in the hope that these will meet the new standard.[1]

All but one juvenile products manufacturer have developed crashworthy devices and are anxious to phase out production of their inferior seats merely complying with #213. They can't do so while other companies continue to market them. For once, there is not only no industry opposition, but industry support for federal rule-making.

If any progress has been made in getting information to the public on safe child transportation, it is solely due to our own organization and a citizen's group Action for Child Transportation Safety which I helped to found and which is pursuing goals similar to those of our own organization.

The problem is not only the inadequacy of devices on the market, but also the fact that they are often not used correctly. A survey by the Insurance Institute for Highway Safety revealed that three out of four special child restraints in use were not used correctly and their protective potential was thereby entirely defeated.

Education of the public on why and how these devices must be used is as important as the safety of the devices themselves. NHTSA has failed in both areas.

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[1] CRASH-TESTED DEVICES AVAILABLE:

American Safety Seat
(Swyngomatic)
Astroseat #V
(Intern'l Mfg Co.)
Bobby-Mac
(Collier Keyworth)
Bobby-Mac LeLuxe
(Collier Keywoorth)
Child Love Seat
(General Motors)
Infanseat Harness
(Questor Juv Prod)
Infant Love Seat
(General Motors)
Kantwet Care Seat #885
(Questor)
Kantwet Care Seat #985
(Questor)
Mopar Child Seat
(Chrysler Corp)
Motor Toter
(Centry Prod)
Positest Car Seat
(Hedstrom Co)
Safety Shell #74 & #75
(Peterson)
Sweetheart #II
(Bunny Bear)
Tot-Guard
(Ford Motor Co)
Wee Care #597
(Strolee)

Rose Mfg. Co. has just developed a new harness which will be marketed by them as well as by Sears Roebuck. (A previous model was found not wholly satisfactory.)

REFERENCES

"Children as Passengers in Automobiles: The Neglected Minority on the Nation's Highways" A. Shelness and S. Charles, M.D., PEDIATRICS, Vol. 56 No. 2, August 1975.
"Don't Risk Your Child's Life!" (a pamphlet) Physicians for Automotive Safety, July 1975.
Physicians for Automotive Safety, 50 Union Avenue, Irvington, New Jersey 07111.

Mr. Moss. Thank you.
Dr. Yeager.

TESTIMONY OF ARTHUR YEAGER, D.D.S.

Dr. Yeager. In 1974, dissatisfied by the slow pace of rulemaking regarding school buses and unimpressed with exaggerated claims of safety by the pupil transportation establishment, Congress passed the Motor Vehicle and School Bus Safety Amendments of 1974.

The resulting Public Law 93–492 mandated the National Highway Traffic Safety Administration to finalize standards in eight specific areas by January 28, 1976.

SCHOOLBUS SAFETY

To evaluate NHTSA's performance I have prepared a chart which follows and I will comment on each section.

[The chart referred to follows:]

NHTSA IMPLEMENTATION OF PUBLIC LAW 93–492

Category	Present school bus	New school bus standard	Evaluation
Emergency exits	Doors, none windows standard 217, window retention.	Amend 217 for either 1 rear exit or 2 side exits at option of manufacturer.	No improvement in status quo.
nterior protection for occupants.	None	None	Ignored congressional mandate.
Floor strength	do	do	Do.
Seating systems	do	Standard 222, pad seats, Raise height 4 in., seat belts for small vehicles.	Poor seat back height n-sufficient, requires many areas to downgrade, no seat belts for most users
Crashworthiness of body and frame (including protection against rollover hazards).	do	Standard 221, strengthens metal seams.	Standard 221, good.
		Standard 220, roof strength requirement.	Standard 220, less stringent than current industry requirement.
Vehicle operating systems	do	None, brake proposal	Failed congressional mandate.
Windows and windshields	Standard 217, window retention.	None	Ignored congressional mandate.
Fuel systems	None	None; leak proof tank proposal.	Failed congressional mandate.

Dr. Yeager. Emergency exits. Automobiles carry six passengers and have two or four doors. Schoolbuses may legally crowd up to 100 children into a bus which has only two doors. That does not make sense.

NHTSA's new standard calls for either one rear door or two side doors at the option of the manufacturer. Since buses are currently being produced with one rear door, and manufacturers will select the single rear door choice, there will be no upgrading. The standard is a reaffirmation of the status quo.

To make matters worse, in the same issue of the Federal Register [F.R. vol. 41, No. 11, January 27, 1976], a proposal to water down this standard appears. If ordered, only the very small percentage of schoolbuses which have motors in the rear could utilize the side door option and the choice would be reduced to one side door and a rear push out window.

In other words, if your bus is front driven it would stay as it is with one rear door. Only a rear-motor bus would have a rear pushout window and one side door.

In a recent study of schoolbus crashes over a 5-year period, NHTSA's David Soule reported that 838 out of 5,872 schoolbus collisions resulted in a schoolbus rollover, a high rate of over 14 percent. Getting children out of an overturned bus is of deep concern. Picture the following situation: A schoolbus is on its left side. The front door is 9 feet in the air as are all the windows on the right side. All of the left side windows are against the ground. When the rear door is opened, gravity tends to close it again. How do the kids get out?

The only way is to have somebody outside the bus holding the rear door open or kick out the front window and have the children climb over the driver's seat around the steering wheel and out. If children are injured in there, broken limbs, unconscious, it becomes extremely difficult to get them out.

The answer is relatively simple. If roof hatches were to be placed in the roof of the bus then egress would be simple. To prevent this sort of disaster buses should be equipped with at least two roof hatches. NHTSA tells us they are thinking about it.

A standard for interior protection for occupants—recessing sharp objects, padding of stanchions, protecting stair wells—as well as a standard for floor strength were ignored by NHTSA.

SEATING SYSTEMS

Every new car sold in the United States is required to have a seat of sufficient height to prevent whiplash and to be equipped with a lap belt for every seating position. The injury and fatality reducing potential of such a seat-seatbelt system is well established.

The new seating standard falls far short. Standard 222 calls for a seat with a back height of only about 24 inches from the cushion. That is about the seated height of a 5-year-old. Since children grow about an inch a year in seated height, when the child is in the sixth grade his head and neck will be over the seat back, when in high school the head and shoulders are vulnerable. Commonsense dictates that the seat back should be higher.

Automotive engineers at UCLA in 1967 and 1969 using sophisticated test methods found that seat back heights in schoolbuses should be at least 28 inches. As a result some States and many districts now require a seat back height of 28 inches. It is therefore with deep personal concern that I must report to you that, as carefully explained by NHTSA, according to 103(d), 15 U.S.C. 1392(d), when the new seating standard takes effect those more responsible localities will be forced to order buses with seat back height reduced by 4 inches. I do not believe that such a downgrading was the intent of Congress.

Of further concern is the persistent watering down of the standard during the rulemaking process. When this seating standard was first proposed in early 1973, it called for a seat of 32 inches in back height and contained an optional seatbelt. As a result of industry pressure, four subsequent notices dropped the seat back height to 28 inches and then to 24 inches; seatbelts were eliminated in favor of seatbelt an-

chorages alone; and then in the final notice the anchorages were dropped. Presently there is no standard or guideline for an end user desiring seatbelts.

As we watched these standards come out and we watched each one, we said to ourselves what did we lose now? From the start to the finish we ended up with very, very little.

The resultant unavailability of seatbelts on school buses is regretable for two reasons: (1) Children are denied the use of a restraint system, if desired, and (2) the potential educational value of teaching and habituating over 20 million children to use seatbelts every school day is lost.

NHTSA explains that children will receive protection from fore-aft crashes by compartmentalization between padded seats. They have consistently ignored postcrash passenger dynamics in side and rollover collisions which represent about 39 percent of schoolbus collisions, 2,262 of 5,872 according to the Soule study.

[The material referred to follows:]

SCHOOL BUS CRASHES, INJURIES AND FATALITIES, 5-YEAR SUMMARY, JULY 1969 TO JUNE 1973

Year	Number of accidents	Number injured			Fatalities			Type of collision				
		In bus	Outside	Other vehicle	In bus	Outside	Other vehicle	Front	Rear	Side	Roll over	Struck pedestrian noncollision not specified
1969:												
Number	1,587	2,826	72	649	30	38	59	319	226	234	150	658
Percent		(80.0)	(1.2)	(17.8)	(23.6)	(29.9)	(46.5)	(20.0)	(14.2)	(14.7)	(9.4)	(41.7)
1970:												
Number	2,249	3,185	101	836	27	39	71	460	279	351	182	977
Percent		(77.5)	(2.2)	(20.3)	(19.8)	(28.5)	(51.7)	(20.4)	(12.5)	(15.6)	(8.1)	(43.4)
1971:												
Number	2,106	3,243	93	840	10	46	71	413	252	304	178	959
Percent		(77.7)	(2.2)	(20.1)	(7.9)	(36.2)	(55.9)	(19.6)	(12.0)	(14.4)	(8.5)	(45.5)
1972:												
Number	2,209	4,178	65	782	41	46	62	440	367	318	163	921
Percent		(83.1)	(1.3)	(15.6)	(27.5)	(30.9)	(41.6)	(19.9)	(16.6)	(14.4)	(7.4)	(41.7)
1973:												
Number	1,854	4,213	23	678	49	29	52	483	371	217	165	618
Percent		(85.7)	(.5)	(13.8)	(37.7)	(22.3)	(40.0)	(26.1)	(20.0)	(11.7)	(8.9)	(33.3)
Total:												
Number	10,005	17,645	354	3,785	157	198	315	2,115	1,495	1,424	838	4,133
Percent		(81.0)	(1.6)	(17.4)	(23.4)	(29.6)	(47.0)	(21.1)	(14.9)	(14.2)	(8.4)	(41.3)

Note: Information is taken from data compiled from newspaper reports of school bus collisions by the School Bus Manufacturers Institute, TBEA, Washington, D.C.

Without restraint in these crashes children are thrown forcibly from their bench-like seats by the lateral forces. We must insist that no protection 39 percent of the time is not good enough.

Because of these reasons, PAS has petitioned NHTSA to reconsider their seating standard. With permission of the Chairman I would like it included at this point in my testimony.

Mr. Moss. Under the previous unanimous consent request the material will be entered at this point in the record.

Dr. YEAGER. Thank you, sir.

[The material referred to follows:]

PHYSICIANS FOR AUTOMOTIVE SAFETY

50 UNION AVENUE, IRVINGTON, NEW JERSEY 07111

PETITION FOR RECONSIDERATION OF MVSS # 222, issued by the National Highway Traffic Safety Administration January 22, 1976:

PHYSICIANS FOR AUTOMOTIVE SAFETY (PAS), a 500-member national organization devoted to promoting motor vehicle safety;

ACTION FOR CHILD TRANSPORTATION SAFETY (ACTS), a 500-member national organization dedicated to promoting the safety of child passengers,

SEYMOUR CHARLES, M.D., PAS President,
ANNEMARIE SHELNESS, PAS Executive Director,
ARTHUR YEAGER, D.D.S., PAS School Bus Safety Chairman,
DEBORAH RICHARDS, ACTS Board Chairman, and
JANET BAJOREK, ACTS School Bus Safety Chairman
as individuals, and
WILLIAM, ANDREW, and DAVID YEAGER; PETER AND JENIFER BAJOREK,
as school bus passengers,

exercising their prerogative according to Section 553.35 of Title 49, Code of Federal Regulations,

hereby petition the Administrator, National Highway Traffic Safety Administration, 400 Seventh Street, S.W., Washington, D.C.,

to Reconsider Motor Vehicle Safety Standard No. 222, School Bus Seating and Passenger Protection:

The standard requires, effective October 26, 1976, a padded seat with a seat back height of 20 inches measured from the seating reference point (SRP) on school buses.

The requirements of this Standard are inadequate and, therefore, not in the public interest by failing to provide adequate crash protection to more than 20 million children who ride these buses

every school day. Furthermore, the standard as written may result in a down-grading of a higher level of protection already adopted or under active consideration in certain localities and states.

From the start of the rulemaking process in February of 1973, and continuing through each of four subsequent notices, the Standard has been subjected to persistent weakening. The 28-inch seat back height (measured from the SRP) proposed originally was reduced first to 24 inches and finally to 20 inches. The option for safety belts was eliminated, replaced with a requirement for belt anchorages; even the requirement for anchorages was removed from the final notice.

As explained in the Federal Register, "The standard relies on compartmentalization between well-padded and well-constructed seats to provide occupant protection on school buses. PAS, in previous responses, has pointed out that this seat design offers little if any protection in lateral impacts: NHTSA's own David Soule has reported the following school bus accident data for 1969-1973:

Type of Collision	Number	Percent	
Front	2115	36	
Rear	1495	25	* Side 1424
Lateral*	2262	38	Rollover 838
	5872	99	

The lack of attention given to lateral impact forces is evidenced in the reply to the Sheller-Globe request for a side facing seat. The Administrator explains in his reply that "The NHTSA designed the seating system in this standard for protection from fore and aft crash forces..." Surely, NHTSA engineers are aware that occupant kinematics in side facing seats in front and rear crashes are the same as those experienced in forward facing seats during side crashes.

PAS insists that without a seat belt there is no compartmentalization of passengers in collisions of lateral configurations which have been shown to occur in 38 percent of all accidents, i.e., in two cases out of five, according to NHTSA's own figures.

Of great concern to petitioners is the apparent ease with which the school bus operators, acting through their Washington lobby, the National School Transportation Association, and their attorneys SURREY, KARASIK AND MORSE,

succeeded in convinicing NHTSA to eliminate the anchorage requirement.

The industry argues that:

anchors have no benefit without seat belts;

only a small fraction of school districts would install belts;

where installation is implemented the seat belts might be used without proper supervision.

Petitioners must strongly disagree. Providing anchorages offers to all purchasers and users the option of installing properly engineered and designed seat belts. The passing statement in the standard that "...an operator or school district may safely attach seat belts to the seat frame...", does not offer sufficient guidance for correct installation. Further, such vagueness on the part of NHTSA may lead some end users to believe that all school bus seats are capable of supporting seat belt assemblies and may be misguided into attaching belts to present school bus seats.

While PAS can furnish no estimate regarding the number of districts which would use seat belts if anchorages were available, we can report that we constantly receive inquiries from around the nation regarding restraints or, more precisely, the absence of restraints in school buses. Districts have indicated to us their willingness to try seat belts.

The argument that an unaware school district might be tempted to install seat belts without ensuring their proper use must be rejected. The members of the National School Transportation Association are not the only individuals privy to the vagaries of school children. Districts are keenly aware of child behavior patterns and their concerns for children's safety must not be subverted by such negativism. These same arguments regarding misuse of seat belts by Surrey, Karasik and Morse on behalf of their industry clients were offered a decade ago during the debate regarding restraint requirements for automobiles. Considering the overall positive result of seat belt use in cars, petitioners must question their unavailability in school buses.

The undeniable educational impact of habituating children to use seat belts on school buses would go a long way toward reducing the annual highway toll in motor vehicle accidents.

The letter of Surrey, Karasik and Morse carries a thinly disguised threat of court action should anchors be required. We are aware that such litigation would further delay implementation of the even now long overdue seat improvements. Petitioners, therefore, suggest that a separate standard requiring seat belt assemblies be issued.

NHTSA, in refuting P&S arguments for a higher seat back height, admits that "...it does not dispute that a properly constructed higher seat back provides more protection than a lower seat back..." and goes on to say that data do not indicate substantial evidence of "whiplash."

We know that school bus injury data are almost non-existent, and do not accept the validity of this statement. For example, the National Safety Council must "adjust" school bus accident and injury reports upward due to "under reporting by the states." Because of this, petitioners suggest that a common sense approach be used. Since the seated height of the average child in the 7-12 grade age group is substantially above the 20" seat back height measured from the SRP, and 25% of all school bus accidents are rear end collisions, it must be clear that the child passenger is exposed to potential whiplash injuries. This is especially true in the van type vehicle with its lower mass and greater crash pulse.

Petitioners are deeply concerned that, according to Section 103(d) of the National Traffic and Motor Vehicle Safety Act states or school districts already requiring the so-called 28-inch seat (about 24 inches measured from the SRP) will be forced to retrench in compliance with federal requirements. New York State as of January 1, 1976 and many districts throughout the country are presently using the higher seat.

To prevent this retrogressive action petitioners urge that the Administrator restrict the seat back height requirement by specifying a minimum of 20 inches measured from the SRP or, better still, raise the seat back height to 24 inches measured from the SRP.

In conclusion petitioners ask that:

(1) The Administrator explain how seats as now required offer adequate protection in lateral crashes;

(2) A separate standard for seat belt assembly anchorages be issued at once to take effect October 28, 1976; and

(3) That either the seat back height be specified as a "minimum" requirement or that the seat back height be raised to 24 inches from the SRP.

Seymour Charles, M.D.
PAS President

Edward Sidlow
PAS Executive Director

Arthur Yeager, D.D.S.
PAS School Bus Safety Committee

Deborah Pickards
ACTS Board Chairman

Janet Bajorek
ACTS School Bus Safety Chairman

February 25, 1976

Dr. YEAGER. Crashworthiness of body and frame and rollover protection. Our studies indicate that the new seam strength standard is good. The provisions for rollover protection are inadequate. Standard 220 allows a roof to collapse up to 5½ inch when subjected to a force equal to 1½ times the weight of the vehicle. This NHTSA admits is less demanding than an industry standard already in force which allows a 5½ inch similar deflection under a load of two times the weight of the vehicle. No explanation was offered for the downgrading.

In passing PAS recommends that considering the high rollover rate for school buses, 14 percent, investigation regarding the stability of these vehicles be undertaken.

VEHICLE OPERATING SYSTEMS

Fuel Systems. Although notices on brakes and fuel systems have been proposed neither area has been finalized into a standard.

WINDOWS AND WINDSHIELDS

Standard 217, in effect before Public Law 93–492 addresses itself to window retention. No standard has been issued to provide needed improvements in visibility, defrosting and windshield wiping.

In conclusion PAS feels that NHTSA has done poorly in implementing Public Law 93–492. When the new standards become effective school buses will have better strength at the metal seams and seats which are higher backed and padded. On the other hand there will still not be enough emergency exits, no protection from hostile post crash interior, floor strength remains inadequate, no seat belts are required—

not even belt anchorages. instability persists leading to rollover and operational systems and visibility are changed little. Apparently NHTSA has preferred to concern itself with the periphery of the Congressional mandate and have not produced a vehicle reasonably designed to give children a safe ride.

It has taken a decade to get these few changes. How long must we wait for meaningful action?

Thank you.

[See p. 472 for NHTSA's response.]

Mr. Moss. Mr. Dodge.

Mr. Dodge. Ms. Shelness, in your testimony you indicate that there is little or no opposition from the chief seat manufacturers to a dynamic test standard. Can you provide the subcommittee, since we suspect this may be a disputed point in your testimony, with the basis for that statement? Have you had an opportunity to speak personally with many of these manufacturers?

Ms. Shelness. Not only with many of these manufacturers, Mr. Dodge, but with the industry representative. There is a Mr. Swigg who is the chairman for the car seat committee of the juvenile products industry. He works for the International Manufacturing Co. who also make car seats. I called him up yesterday. I ascertained from him that there is only one manufacturer now who has not developed a seat that has passed the criteria established by the University of Michigan. And that manufacturer is still working on a new seat.

It really is a case of the industry having felt that they had a responsibility to the public. I should like to say that there was a great deal of opposition originally, 4 or 5 years ago, but there has been a complete turnaround.

I went to the juvenile products manufacturers' show again last October where I speak to usually the presidents and representatives of the companies. They are all for it and they would like to phase out their inadequate seats. They can't do so while one or two companies remain in business making the so-called junky seats, as we like to call them, because they would lose sales. They still have to stay in business. They are not in business for good deeds. So they have to keep the 213 seats on the market.

Mr. Dodge. The objection that we hear continually is that the dummy, the 3-year-old dummy, still needs to be perfected. This is not a new objection. I wonder whether you have had an opportunity to explore the validity of that continuing objection?

Ms. Shelness. I am not an engineer, it is very difficult. All I can do is talk to people like Stalnaker, Melvin, and so on. They feel NHTSA is now out to get something too perfect. It is a matter of test criteria and repetition of tests.

I have no objection to them getting to the ultimate and something that can be repeated with no variables because there are a lot of variables. You have to be able to repeat the test with exactly the same criteria each time in order to meet a certain seat requirement. Maybe they have a certain amount of difficulty with that while the dummy is not perfected.

What we felt was that an interim standard should be enacted now, we felt that something should be enacted in between while they are puzzling over how to get the ultimate protection.

Mr. MAGUIRE. Will you yield to me at that point?

Ms. SHELNESS. Yes.

Mr. MAGUIRE. I want to understand this problem with the child dummy. I found the answers I got this morning quite inadequate.

Is the theory that they are advancing that if the dummy were made differently, presumably to be a more exact duplication of a real child or something, that these harnesses would not collapse at the 30-mile-per-hour speed? Isn't that the question? If they collapse then it is no good? Is that the argument?

Ms. SHELNESS. You are quite right, it would have absolutely no effect on whether the devices collapse or not. The weight of the dummy combined with the G forces which these devices are subjected to, would certainly cause them to collapse regardless of the type of dummy.

Mr. MAGUIRE. What is the relevance of the dummy's further perfection to the question of whether or not the seats collapse?

Ms. SHELNESS. None at all. That is why we said to them that they should enact an interim standard. With the perfected dummy, and they have had a lot of trouble with the adult dummies, too, it is not only that the dummies should be able to faithfully reproduce the movement of the human body, which is a very difficult thing because we have a great deal of flexibility in our limbs; the dummies also have to record on certain parts of the body impact forces.

It is the hardness in certain places and how much will a human skull take and this should be reproducible in the dummy's skull. I cannot go into the engineering intricacy of this. This is what NHTSA is trying to get not only in the child dummy but also in the adult dummy. They are trying to get the child dummy very similar to the adult dummy.

Your question is quite correct, the seats that collapse and I don't know whether the committee saw the films but the devices literally collapsed, all the steel tubes were coming out in different directions. That would not be affected one way or the other.

Mr. MAGUIRE. The only remaining question is how badly damaged is the human body going to be after the seat collapses, is that right?

Ms. SHELNESS. That is right.

Mr. MAGUIRE. We are spending a lot of time perfecting dummies in order to find out whether you have multiple fracture of the skull or simple fracture of the skull or what have you. I think that borders on the absurd.

Thank you.

Mr. DODGE. Dr. Yeager, you submitted for the record a petition. Has this petition for reconsideration of standard 222 been sent to the Highway Traffic Safety Administration?

Dr. YEAGER. Yes; and I would like to thank the committee because the proper people were here and we served the petition this morning as a going away present.

Mr. DODGE. Can you in the future keep this committee posted as to the response you receive to that petition?

Dr. YEAGER. We certainly will, sir.

Mr. DODGE. Thank you very much.

I have no further questions.

Mr. MOSS. Mr. Maguire.

Mr. MAGUIRE. Thank you, Mr. Chairman.

I just wanted to clarify one point on page 3 of your statement, Mr. Yeager, with regard to the seat back heights. When you say that the new seating standard will force localities that have adopted more than the 24 inches to revert back to the 24 inches from the 28 inches, why is that? Is that because by law they won't be able to have higher seat backs or the manufacturer won't make them with higher seat backs or what?

Dr. YEAGER. By law, when the National Highway Traffic Safety Administration issues a standard directed to one specific thing, a seat back or a seat back height, no other authority, whether it be Federal or local or school district, may change that in any way.

Mr. MAGUIRE. Even to improve it?

Dr. YEAGER. Even to improve it. I quoted the section there.

Mr. MOSS. I think we have a little misunderstanding. I think a school district may purchase a bus with safety package, and it is clearly within the option. We have not taken away from the school districts the authority to exercise their independent judgment.

Dr. YEAGER. May I read that section?

Mr. DODGE. If I may suggest what the problem is here——

Mr. MOSS. The question really goes to whether or not a manufacturer wishes to take the order to produce it. There is nothing to prevent him from producing it.

Dr. YEAGER. Section 103(d): "Whenever a Federal motor vehicle safety standard is in effect, no State or political subdivision of a State shall have any authority either to establish or continue in effect with respect to any motor vehicle or item of a motor vehicle equipment any safety"——

Mr. MOSS. Doctor, that is exactly what I am addressing myself to. I am quite familiar with the doctrine of preemption. I am saying that a school district desirous of buying a safe bus can do so to meet its own specifications. It may not go below the Federal specifications, but it can exceed them.

Now, a State cannot adopt a law that prescribes mandatorily a standard that is different from the Federal standard, but the school district which does the buying of the buses can impose any kind of additional requirement it wants as a specification which must be met by the manufacturer or they will not buy from him.

Dr. YEAGER. As I understand, what was asked for was a wider spacing. Let us assume that the school district did not want to crowd the bus with 11 rows of seats and perhaps wanted to have eight rows of seats more widely spaced. In their opinion, they could not do it because once the seat spacing distance had been established, it couldn't be changed.

Mr. MOSS. A school district is pretty much the sovereign in determining whether it wants to have a better bus than the standard prescribed by the Federal Government. I am not here entering any defense for anyone, and I believe that the record will show quite clearly that while you cite April 1974 as the date of great concern, I raised this question when I was the coauthor of the original Auto Safety Act in 1966, and I have been fighting to get better schoolbuses, safer schoolbuses.

If my city of Sacramento wants to place an order for buses specifying 8 rows of seats and not 11, it can damn well do so. There is nothing in the Federal law that says that it cannot.

Mr. Maguire. Isn't there a practical difficulty at that point, though, relating to the availability of buses and their cost?

Mr. Moss. Most of these buses are made on order; and from the manufacturers who appeared before this committee, a number of them supportive of much more exacting standards than have been required by the Federal Government, they indicated their willingness to produce a safe bus. In fact, some of them have safety packages that exceed any Federal standard contemplated, available for additional cost.

I would not want a school district to feel that it was bound by what appears to be a relatively weak response of NHTSA to the mandate of the committee. I am not sure that we will not take some steps on behalf of the committee to see that the mandate is specified in the standard——

Dr. Yeager. Mr. Chairman, we are well aware of your fantastic support of this legislation since 1966. In our petition we have asked for clarification on this very point, that if a standard addresses itself to a specific issue, can a jurisdiction surpass. Further in our petition we suggest that the standard be changed, that the word "minimum" be inserted which would certainly clarify it; their standard be a minimum standard, and that they make that statement clear.

Mr. Moss. There is nothing preventing the school district from building its own buses if it wants to. I think these do become minimums. Minimums tend to become maximums for most school districts because of budgetary constraints. There is nothing to prevent the school district which has the resources from requiring a far more stringent standard than that applied by the Department of Transportation.

If it wants a triple backup brake system, it can do it. I think we ought to have as an absolute minimum on the Federal level, a rule that no bus could be produced that did not meet it. That is really what we are talking about, not in any way the limitation upon the right of a district to order a bus from a manufacturer willing to construct it.

Dr. Yeager. Thank you.

Mr. Maguire. Mr. Chairman, if I might continue for a few moments, I would like to ask both of the witnesses what their analysis is of the underlying reasons why an agency of this sort set up by congressional action with a specific mandate has such a miserable record of timeliness in setting standards and adequacy of standards.

You referred earlier to the fact, Dr. Yeager, that you start at a certain point which seems to be that point that any sensible person would start at based on available evidence. By the time the process is completed and standard issued, you have something which approximates nothing or a minimum which is far below what is desirable.

What are the underlying reasons for this? In all the work both of you have done over the years, you must have drawn some conclusions or at least developed some thoughts on the subject of why we face this problem in Government.

This is what this hearing is about, to make the regulatory process function better.

Dr. Yeager. Mr. Maguire, we have agonized over this for hours and hours. It seems to me that there are certain imperatives. When you are

in a multimillion-dollar industry, the manufacturers, the people who purchase them—either school districts or contract operators—the school budgets to be prepared, the profit motive, there is a tremendous economic imperative on that side.

Let us talk about the other side. You know in the industry they talk about the end user as if the end user is the one who purchases the vehicle. The end user is not the purchaser of the vehicle. The end user is the children who ride the buses. Mother gets them ready, and they ride off to school. They could not care less whether the seats are bad or have seatbelts or any of the concerns we voice today. There is little imperative on our side.

Who has the expertise to challenge the engineers of manufacturers? Who has the gall to go speak to pupils, transportation supervisors, and directors of pupil transportation? They will tell you it is the safest transportation in the world.

We cannot mobilize a great deal of effort and literature. We cannot bring the people to Washington to picket. We don't have the economic resources.

Mr. Moss commented on the docket that removed the seatbelt anchorage. The schoolbus industry had lawyers write a letter that ran 11 pages, one of these fancy Washington law firms with a cable address in Zurich and everything else. I will be willing to bet they spent more money on that one letter than PAS has as an operating budget for perhaps 5 years.

Mr. Maguire. The irony being, of course, in spending all that money to perpetuate a status quo which is inimical to the health and welfare of consumers, they then will spend the money and presumably pass on those costs to the very same consumers.

Dr. Yeager. Unquestionably.

Ms. Shelness. Mr. Maguire and Mr. Chairman, I would like to clarify something Arthur said.

When we are talking about the industry, there are two sides to the industry. One is the manufacturers themselves. I must say on the whole as you pointed out, Mr. Chairman, the manufacturers have come out already with these packages. There are manufacturers who make the better structure and higher back seats and sold them to school districts 3 years ago.

I don't think it is the manufacturers; they only stand to gain to some extent because they will get more money for the buses. It is the operators, the contractors who have to at the end of the year show a profit for themselves. It is the schoolbus operators' lobby which seems to live on Capitol Hill and at DOT, and go to hearings and simply manages to counter everything the people for bus safety have been trying to do over the years.

We feel so helpless. Here is the lobby with a tremendous budget, a so-called nonprofit organization which is something I always resent, and a group which consists of volunteer doctors, not forgetting the dentists, who have no funds to counter that.

The schoolbus operators have a direct financial stake in this. Although the cost will ultimately be passed on, they have a job in the district bidding. It is all put out on bid, as you know. It is lowest bid that gets the contract.

Mr. MAGUIRE. Are you suggesting that they have an impact on the decisionmaking processes within NHTSA?

Ms. SHELNESS. A tremendous impact. I had a note from a member of the Motor Vehicle Advisory Council—I don't think I can mention her name without her permission at this point—where she sent me some of the schoolbus standards and said, "Annemarie, this lobby is here, they have presented their case, and where are you people? Can't you come to Washington more often?"

Mr. MAGUIRE. Why wouldn't NHTSA adhere to a process that gave top priority to the factual material that was available to them?

Ms. SHELNESS. Mr. Maguire, I don't understand it myself. That is the big enigma. We don't know.

Mr. MAGUIRE. They admit they get most of the factual material from the industry.

SEATBELTS IN SCHOOLBUSES

Ms. SHELNESS. You see, there is someone working at NHTSA who, while Dr. Haddon was still in office, used a physician who put out a paper which showed that seatbelts were harmful to children under the age of 10. We don't know whether this particular physician was paid to go around the country to broadcast this theory.

I picked up a letter by a Congressman where there had been State testimony given by this official—I don't know if I dare mention his name—where it was said that seatbelts in schoolbuses for children under the age of 10 would be terribly dangerous, and in fact, that seatbelts for children under the age of 10 in all motor vehicles were dangerous.

I then sent a letter to Dr. Haddon who put out a memo of which I should make such statements. The gentleman who made it is still on the staff.

Mr. MOSS. If the gentlelady will yield, I believe that in the hearing record before this subcommittee in either 1973 or 1974 that there was testimony given by a consumer group very strongly oriented to protection of the child expressing serious reservations about the use of belts as a means of dealing with safety in a schoolbus, pointing out that there would be in many instances three or four youngsters to a seat depending on the age group of the youngster, the problem of getting the child of 6, 7, 8 to fasten the belt, if there were enough belts available, and we had strong recommendations that passive-type restraints be considered as more desirable alternatives than seatbelts themselves.

I think in simple fairness to a difference of opinion that we should not undertake here to leave a record implying a lack of interest.

I personally have very serious reservations about the efficacy of belts in schoolbuses for grade school students. I have seen some of them very heavily crowded. As long as school districts will permit them to be loaded far beyond any reasonable capacity, we are kidding ourselves if we think that the schoolbus is going to become safer because of a belt.

Far better that we have padding. Far better that we have improved seating, perhaps a different layout entirely for seating than presently employed. Perhaps restraint bars properly padded where the youngsters are protected, whether there are two or four seated together.

There are legitimate differences of opinion which should connote no sensible lack of interest or concern over the welfare of the student.

Dr. YEAGER. It is our feeling on the seatbelts that, for example, my children are not allowed in our car without being restrained, wearing a seatbelt, and it should be so in everyone's car. It is of concern that they spend more time in a schoolbus, and there is not even the availability of a seatbelt there. I have with me a list of many objections to seatbelts and our response to them.

I would not want to take the time now——

Mr. Moss. As one who, again going clear back to the 1950's, participated in starting down the road to the mandatory seatbelt, I have used one back since the days when you had to go shopping to find a shop that would install them for you.

Dr. YEAGER. That has been our experience.

Mr. Moss. We had quite a victory when we finally found it possible to get the boltholes through the floorboard to accommodate seatbelts if the person wanted to buy them as an option and then to get the manufacturers to promote them as options. That still does not deal with the problem of the typical schoolbus. That is a different matter.

I don't question that belts used save lives. The mere presence of seatbelts for three to a seat in a schoolbus that is going to have four to a seat is not going to insure protection to the children.

Dr. YEAGER. Mr. Chairman, in the seating standard, seatbelts are required in vehicle under 10,000 pounds. This means the van-type vehicle. Now, in the larger vehicle, the same seat is required except the seatbelt is not required. So to question the dichotomy of opinion, that if you have, say, a three- or four-row school bus that you are required to have a seatbelt, and if you have something larger, the conventional style, you are exempted from the seatbelt. In our opinion, granting everything that you say, if there are no problems with children wearing seatbelts in a small bus, it is the same for kids who number twice or three times as many in the larger bus.

Mr. Moss. What would you prefer, seat belts or an effective restraint system?

Dr. YEAGER. No question, an effective restraint system but lacking an effective restraint system, and I don't think what NHTSA has come up with is an effective restraint system——

Mr. Moss. I am not at this moment defending what NHTSA has come up with. In fact, I am just told by the staff here that I expect to have a report on the standard and its responsiveness to the provisions of the statute which I authored. But I don't think the alternatives are this meager effort or nothing. I think the alternatives are numerous and we intend to explore those.

Dr. YEAGER. In further response to your question, without any question a passive restraint works 100 percent of the time. All you have to do is sit down and the system is effective, it is there. I don't care what the system is. If it is a restraint system, fine.

In schoolbuses, considering the state of the art and considering the 10-year longevity of schoolbuses, if we started today kids in kindergarten could conceivably go through their entire time in school and graduate from high school and not see that system. There is no effective

passive restraint system today. When a bus is hit from the side the passenger falls in the aisle.

Mr. Moss. I am not willing to accept that there is no system available——

Dr. Yeager. That will effectively restrain children in all configuration crashes that are happening on the road today.

Mr. Moss. You are adding a lot of qualifications to your statement because your seat belt is not going to do that.

Dr. Yeager. Not 100 percent, no, sir.

Mr. Moss. So let us not throw qualifications on the one without demanding it on the other.

Dr. Yeager. A seat belt system is not a perfect system. It is an improvement.

Mr. Moss. That confirms the point. I don't want people of good will, of good faith, to be branded as being disinterested because they are not supportive of seat belts in schoolbuses.

Dr. Yeager. I agree.

Ms. Shelness. May I clarify briefly something.

There are two aspects to the opposition to seat belts. One, is the seat belt harmful to the child? Can it cause internal injuries until the child is above the age of ten? That is what I raised. That was one of the aspects used, that the seat belt itself in a crash could hurt the child.

Now this has been entirely refuted but it was being used at that time to counter all attempts to have seat belts installed in buses. This is what I objected to.

Now I think there is every justification in saying would belts work in a bus in view of the present discipline problems and in view of the four-seat seating and so on. It is really a matter of what happens on a schoolbus. It would be up to the schools to some extent also to provide the discipline.

There were two aspects to this. It has been shown that seat belts are a safe means of restraint as far as the child's internal organs are concerned.

Mr. Moss. I don't question that.

Ms. Shelness. This was one of the arguments used.

Mr. Moss. I am questioning the allocation of resources if we are going to impose certain mandatory requirements.

CONSUMER PARTICIPATION IN AGENCY RULEMAKING

Mr. Maguire. May I ask both of you another question which follows on the one I asked earlier.

You have indicated that you feel that some industry principals have substantial and indeed I would suspect you would say inordinate influence on the final result both as to timeliness and as to adequacy of standards.

The other part of it is what can be done administratively or legislatively to provide more adequate public and consumer participation and representation in the process of setting these standards? Have you given that any thought or would you like to comment on that now or submit a statement?

Dr. Yeager. We have given tremendous thought to the answer where do you start when you talk about improving safety?

You start with the figures, how many people are hurt, how many million miles and so forth. On the last page of my testimony you will see NHTSA figures prepared by David Soule. The information is taken from reports of school bus collisions by the School Bus Manufacturers Institute.

This is all we have to base it on. I go over to DOT. It is a tremendous building. There are all kinds of people working there. It seems incredible, if you ask how many people are hurt each year in school buses, they don't know and they have to ask the schoolbus industry.

Something has to be shored up there so that we get substantive data. How do we move when they don't do it?

The chairman's bill was passed 15 months ago. I am not satisfied with it. That is why we are here. That is why we have oversight. You pass a bill. You wait 10 years for them to do something. They finally do something and it is inadequate.

Mr. Maguire. In treating responses to representatives of various interested groups, is there anybody there to receive and act on the stuff that you provide?

Dr. Yeager. Yes. The material goes into the docket.

Mr. Maguire. How quickly do they do it?

Dr. Yeager. We don't get any response. It goes in the docket. They will read it. In the standard they will have some comment that PAS said this or this group said this or this manufacturer said that. All I can say it that when the original standard came out the school bus industry got together and said in no way would 32 inch high seats and anchorages be furnished, they wanted a seat with a 24 inch height. They also agreed to better padding and structure.

When the standards finally came out that is exactly what was ordered.

Mr. Maguire. Would it be advantageous to have a consumer council office in the agency or separately through the Consumer Protection Agency which has been proposed to be set up to ride herd on them?

Dr. Yeager. I think that would be most positive.

Mr. Maguire. Which would you prefer?

Dr. Yeager. I would have to study it. I don't know. I think it would be positive for another reason. When we were here last year for hearing before this subcommittee there were groups represented that no longer exist. You know an accident happens in a particular area, people are excited about schoolbusing. Five years later there is not the persistence. The industry is still there.

Mr. Maguire. Are there any other suggestions you have?

Ms. Shelness. I would like to point out one thing. Congress has recently required the Motor Vehicle Advisory Council to have increased consumer representation—that is the council which advises the Secretary of Transportation.

I went before that council a few months ago in order to explain to them what had or had not been done on schoolbuses. My experience is that there are very few people on that council, industry or otherwise, who know very much about automotive safety in general. That was my impression. Certainly much less than you do.

The second observation is, and that I have from Council members, that they have so little input—that here we have a so-called consumer

representation, half industry and half consumer—whatever that means. So they are sitting there getting $100 a day and all their expenses, drawn from all over the country. They make recommendations and the Secretary does not act upon those recommendations.

Presumably, if there were more input or another group or another ombudsman or whatever you like, I feel the same would happen. It is just that the recommendations are being ignored.

Mr. MAGUIRE. Why is that? Of course that takes us back to our earlier discussion.

Dr. YEAGER. I think you heard, Mr. Maguire, part of it today in response to many of your questions.

COST-BENEFIT ANALYSIS

Mr. MAGUIRE. Let me ask one final question, Mr. Chairman. I do appreciate the Chair's patience.

How do you feel about NHTSA's use of a $240,000 figure as the value of a human life in their cost-benefit analysis of the economic aspects of proposed alternative policies.

Dr. YEAGER. I have a one word answer. I think it is obscene.

Mr. MAGUIRE. Ms. Shelness?

Ms. SHELNESS. The National Safety Council puts the figure lower, somewhere like $175,000. These are such abstract things that I cannot comprehend them.

Mr. MAGUIRE. As I understand it what they do in a cost-benefit analysis and I am all for cost-benefit analysis but when you move on to human life you are dealing with a qualitatively different plane. They take the $240,000 figure and they multiply that times the number of people who are dead under a specified set of circumstances and then that gets balanced off as I understand it against the incremental cost to the manufacturer of producing some sort of safety device.

Then we are supposed to be weighing those things on some sort of scale in deciding when additional costs—the words that are frequently used are things like appropriate.

Mr. Moss. Would you yield?

Mr. MAGUIRE. I will yield, sir.

Mr. Moss. Again I want to have the record reflect that this committee consciously considered economic impact and rejected it and the statute and the record of the legislative history makes it quite clear that economic impact is not the basis for consideration of safety standards. It has been improperly injected into the considerations by the Council on Wage and Price Stability. They are without any authority to impose that in face of the clear statutory language and the legislative history of this particular act.

Mr. MAGUIRE. I thank the chairman for that clarification.

I might point out that the witness, Dr. Gregory, this morning indicated that the Council on Wage and Price Stability accepted NHTSA's own figure. So NHTSA itself is using the figure of $240,000 for a human life as I understand it.

Mr. Moss. They also did not ascertain that they relied on a cost benefit ratio in arriving at these standards.

Mr. MAGUIRE. That is correct. I thank the chairman.

I have no further questions, Mr. Chairman.

Mr. Moss. I thank you again because I have had your organization appear before the committee I think on about four or five occasions over the years as we have worked on these problems. You show a continuing commitment. I urge you to do all you can to intensify it.

You ask what can be done. There are always many forces working to block the achievement of safety standards. There are those who feel that human life is totally expendible. Perhaps it is. There are others of us who feel it has some value and should be conserved.

There is also a very important economic issue here. Injuries are costly to somebody. They are very costly to society as a whole, if for no other reason than to save our pocketbooks, a little more safety might help in that direction.

The school board probably is as deeply beset with problems as any unit of government. I don't think there is a school budget which comes that does not lead to many individual taxpayers appearing to protest the levies for expenses. So it is quite understandable when they seek to cut the cost of everything they acquire.

We have to resist cutting into the bone itself which is what we are doing when we start to buy inferior buses.

If there are no further questions the subcommittee will excuse you with our thanks and stand adjourned.

Dr. YEAGER. Thank you, sir.

[Whereupon, at 1:30 p.m., the subcommittee adjourned.]

APPENDIXES

APPENDIX I

Documents Relating to NHTSA Passive Restraint Rulemaking

1. Letter, John E. Moss to James B. Gregory, January 19, 1976.
2. Letter, James B. Gregory to John E. Moss, Febraury 18, 1976.
3. Letter, Ralph Nader to Honorable William T. Coleman, Jr., December 23, 1975, and Response, dated April 20, 1976.
4. Letter, Albert Benjamin Kelley to Judith T. Connor, May 10, 1976; (No Response called for; letter placed in docket by DOT).
5. Letter, Donald L. Schaffer to Hamilton Herman, May 11, 1976 (No Response called for; letter placed in docket by DOT) Excerpts only.
6. Letters, Donald L. Schaffer to Honorable William T. Coleman, Jr., May 21 and May 25, 1976, and Coleman response to both letters, dated July 6, 1976.
7. Letter, Ralph Nader to Honorable William T. Coleman, Jr., June 3, 1976.
8. Department of Transportation Release, June 9, 1976.
9. Statement of John E. Moss, June 9, 1976.
10. Morton Mintz, "Decision Delayed on Auto Safety Aids," *Washington Post*, June 10, 1976, pages D. 13 and D. 15.
11. Letter, William T. Coleman, Jr., to Ralph Nader, June 10, 1976.
12. "How Air Bags and Seat Belts Complement Each Other" by Leon S. Robertson, April 27, 1976.
13. Statement of Ford Motor Company on Passive Restraint Systems, May 20, 1975.

House of Representatives,
Subcommittee on Oversight and Investigations of the
Committee on Interstate and Foreign Commerce,
Washington, D.C., January 19, 1976.

Dr. James B. Gregory,
Administrator, National Highway Traffic Safety Administration,
Washington, D.C.

Dear Dr. Gregory: This Subcommittee's long-standing interest in the outcome of the passive restraint rulemaking remains undiminished as we enter the New Year. It is simply not acceptable that this critical rulemaking, begun six and one-half years ago, has still not yet resulted in a final decision.

It was my understanding that you had intended to promulgate a rule in this proceeding before the end of 1975. Now I am advised that the need to study even more data is the stated reason for the latest in a marathon series of delays.

The Subcommittee requests your definitive timetable for this proceeding. The target date is important because NHTSA is holding up much needed upgrading of FMVSS 203, impact protection from steering columns, pending the outcome of the 208 rulemaking.

In addition to your advice in this regard, the Subcommittee also requests a complete listing of recently received data under study in this rulemaking, and an indication of the conclusions suggested by these data.

The Subcommittee would appreciate this timetable and material by February 3, 1976. Thank you for your prompt attention to this request.

Sincerely,

John E. Moss,
Chairman, Oversight and Investigations Subcommittee.

U.S. Department of Transportation,
National Highway Traffic Safety Administration,
Washington, D.C., Feb. 18, 1976.

Hon. John E. Moss,
Chairman, Oversight and Investigation Subcommittee, Committee on Interstate and Foreign Commerce, House of Representatives, Washington, D.C.

Dear Mr. Moss: This is in response to your letter of January 19, 1976, regarding Federal Motor Vehicle Safety Standard No. 208, Occupant Crash Protection.

The May 1975 hearings were comprehensive and provided a pretty clear focus on current technology and industry capability, along with many of the previously held disparate views, of course. At that time, NHTSA was promised additional data which we did indeed receive, including the DeLorean Corporation's detailed benefit cost analysis and results of some fundamental studies on safety belt effectiveness and usage. These latter included results of our own studies which became available in the latter part of the year. Additionally, I believe the meeting served as a catalyst to bring forth ultimately as *quantitative* a picture as possible.

There is no question in my mind that the next significant and predictable reduction of highway fatalities and injuries within a predictable time will come with improved occupant restraint. The results of our analysis present us with defined options and a basis for rulemaking decisions.

It is unfortunate that there has been so much polarization over such a vital issue. Not only is this evident in Congressional mail and communications from various interest groups, but in correspondence from private citizens as well. It is therefore important that any rulemaking be backed up by as meticulous an analysis and justification as possible.

While I cannot give you a precise day on which our rulemaking will be completed, I can indicate to you that my goal is to issue a final rule prior to the traditional August recess this year and I am confident we can do so.

With respect to your comments on MVSS 203, while protection afforded relates to occupant restraint, I view any delay principally as one proceeding from the need for additional accident and biomechanical data.

Sincerely,

James B. Gregory,
Administrator.

December 23, 1975.

Hon. William T. Coleman, Jr.,
Secretary, Department of Transportation, Washington, D.C.

Dear Secretary Coleman: The Department of Transportation has had rulemaking pending on lifesaving passive restraints since July 1969. Repeated delays have pushed the original effective date for early 1972 models (those made after January 1, 1972) back to no earlier than early 1978 models. Cars made without passive restraints during this five and one-half year period will cause at least 45,000 deaths and hundreds of thousands of injuries that could have been avoided if passive restraints had been installed beginning with the 1972 models.

On May 19–23, 1975, the National Highway Traffic Safety Administration (NHTSA) held extensive public hearings to review the record on passive restraints prior to making a final decision. That hearing firmly established the reliability, feasibility and effectiveness of passive restraints. Few safety technologies have been so proven as passive restraints which have already traveled more than 100 million miles on vehicles in use.

Seven months have passed since the extensive May hearings but no decision has issued on the lifesaving passive restraints. For every month that passes without a decision, the auto industry finds itself more able to say that the lead-time for the designated model year is inadequate. So unsupportable *delay* means an unconscionable *decision* for the auto industry. Even while the NHTSA is making the passive restraint decision, it is letting out redundant research contracts that can be used by the auto industry and non-safety government agencies such as the Council on Wage and Price Stability to urge further delay for more consideration. For example, the NHTSA on December 17, 1975, entertained corporate proposals for a 19 city seat belt usage study that could take up to two

years to complete. If the passive restraints are to be required in two years, why is yet another seatbelt usage study being conducted at the taxpayer's expense?

An immediate decision on passive restraints is all the more necessary due to the shift to smaller cars to improve fuel economy. All other factors being equal, present small car occupants have more severe injuries in crashes than do large car occupants. According to John Z. DeLorean, former General Motors Vice-President, the shift to smaller cars will result in an incredible 40 percent increase in injuries and fatalities by 1985 if no improvements in restraint systems are made. Mr. DeLorean's studies show that air bag installation beginning with 1978 models will save 69,000 lives over the next ten years, more than offsetting the effect of shifting to smaller cars. The foreign manufacturers participating in the Experimental Safety Vehicle Program have dramatically shown that small cars can be made safe with passenger survival at up to 50 miles per hour in *barrier* crashes or far above what present large cars can do. This safety in small cars is made possible by coupling passive restraints with improved vehicle structure that adds relatively little vehicle weight.

In conclusion, would you provide an explanation of what the NHTSA has done to advance the passive restraint rulemaking since the May 1975 hearings and when a decision on passive restraints will be made.

Sincerely,

RALPH NADER.

APRIL 20, 1976.

MR. RALPH NADER,
Washington, D.C.

DEAR MR. NADER: This is in response to your letter of December 23, 1975, requesting information on the progress of our rulemaking on passive restraint systems for motor vehicles.

Since the May 1975 hearings on the subject, the National Highway Traffic Safety Administration (NHTSA) has been occupied in analyzing the data presented at the hearings, new data regarding restraint systems effectiveness, a cost-benefit analysis of the John Z. DeLorean Corporation Study, and the major changes in highway traffic caused by the fuel crisis and the nationwide speed limit.

NHTSA has also prepared material for my review which discusses optional decisions applicable to FMVSS 208. We are assessing the design options, as well as the social benefits and economic impacts which might be caused by mandating passive or active restraint systems.

I am aware of your interest in this very important safety issue and am attempting to seek a resolution as quickly as possible while giving all interested parties an opportunity to register their views for consideration. A copy of your letter has been placed in the public docket on occupant crash protection.

Sincerely,

WILLIAM T. COLEMAN, JR.

INSURANCE INSTITUTE FOR HIGHWAY SAFETY,
Washington, D.C., May 10, 1976.

MS. JUDITH T. CONNOR,
Assistant Secretary for Environment, Safety and Consumer Affairs, U.S. Department of Transportation, Office of the Secretary, Washington, D.C.

DEAR MS. CONNOR: I am writing to follow up on our discussions with you on April 27.

Because your original request was that we brief you, Mr. Herman and Dr. Jischke on the Institute's relevant research and data concerning passive restraints, I was surprised to find that the format of the meeting was more that of a debate, with a number of DOT staff members taking the part of antagonists to air bag technology, or, as Mr. Schmidt said, "devil's advocates."

This was dismaying. The issue that has been before the Department and the public for more than six years is not whether auto makers should be ordered to put air bags in cars; the law clearly (and I personally think correctly) leaves such design judgments to the manufacturers, and relies on their long-developed technological competence to make the correct decisions from available design alternatives.

The question before the Department and the public is simply this: Should auto makers be required to provide passive restraint protection—that is, protection for one or more occupants against deaths and serious injury in in specified types of crashes—on all new cars starting on a future date certain? This is, of course, a performance—not a design—standard.

Rarely has a contemplated performance standard been so thoroughly proved in the field for so long before its issuance. (Few federal performance standards, including those being met by provision of safety belts, head restraints, and other crash protection features of cars, have been so thoroughly researched and tested in advance of their introduction.) In the case of passive restraints, manufacturers developed both systems now available to the public—air bags and passive belts—and then made those systems available on many thousands of automobiles, and, in the process, certified that these systems *already meet* a federal passive restraint standard which has been a proposal for some six years, and an option to the manufacturers for four years.

(Should there be any doubt, incidentally, that both air bags and passive belts have been highly touted by domestic and foreign automobile manufacturers for some years, note not only the 1973 General Motors film that we screened for you at the briefing, but also Eaton Corporation's three films made in 1969 and 1970, in which narrator Rod Serling emphasizes the great success and unparalleled research and testing basis for Eaton's air bag system, and subsequent films by Volvo and Volkswagen demonstrating and praising passive belt systems. If these films are not available to you, we will be happy to provide prints. The films make clear that, as GM says in its version: "Naturally, years of research and testing have gone into the development of passive restraints.")

In *Chrysler Corporation, et al. v. Department of Transportation, et al.*, 472 F.2d (6th Cir., 1972), the court said that, "The explicit purpose of the (1966 National Traffic and Motor Vehicle Safety) Act . . . is to enable the federal government to impel automobile manufacturers to develop and apply new technology to the task of improving the safety design of automobiles as readily as possible." The court refused to accept auto manufacturers' interpretations of the Act under which, it said the Department "would be unable to require technological improvements of any kind unless manufacturers voluntarily made these improvements themselves."

"This is precisely the situation that existed prior to the passage of the Act, and we decline the eviscerate this important legislation by the adoption of this proposed interpretation" the court said.

The present situation, however, contains potentials for just what the court was rejecting. The short of it, as the attached 1970 article shows, is that auto makers and their contractors developed systems to provide passive crash protection, and brought these systems to the Agency's attention (in 1968 and 1969); on that basis the Agency proposed an appropriate passive restraint *performance*, not design, standard; seeking a delay in that standard, the three largest domestic manufacturers promised voluntarily to make hundreds of thousands, and by the current model year millions upon millions, of air bag equipped cars available to Americans (they, not the government, decided on the air bag design, just as Volkswagen, not the government, has decided on the passive belt alternative); then, the same manufacturers slashed their air bag production to zero in two cases and a maximum of ten thousand cars in the third; Ford Motor Company sought and got a Department standard for the ignition interlock, a system that at best had been only skimpily tested; now, GM, the sole trustee of air bag availability in the U.S. market, says it will discontinue offering the system.

The Department's duty under the 1966 Act and the *Chrysler* decision, and in the interests of the people who otherwise will die or be crippled in future car crashes, is clear; indeed, the Agency should already have met its obligation to the public to require passive restraint protection in all new cars sold in this country.

Mr. Schmidt suggested that one of his reservations about a passive restraint standard was that it will be "unpopular"—that he has "a mailbag full of letters from people who are against air bags," and feels that Congress may reject a passive restraint performance standard. Since most of the information made available to the public concerning air bags has been at best confusing and at worst misleading, this is not surprising. But the Act does not require or even permit the Department to set standards on the basis of public opinion and pop-

ularity. It requires standards which set performance criteria that are practicable, meet the need for motor vehicle safety and are objective—all to the end of protecting the public against "unreasonable risks of accidents occurring as a result of the design, construction or performance of motor vehicles and . . . of death or injury in the event accidents do occur. . . ."

In reporting out the Act, the Senate Commerce Committee said that the law "reflects the conviction of the committee that the soaring rate of death and debilitation on the Nation's highways is not inexorable. This legislation also reflects the committee's judgment that the Federal Government has a major responsibility to meet in assuring safe performance of private passenger cars which it has not yet met. Finally, this legislation reflects the faith that the restrained and responsible exercise of Federal authority can channel the creative energies and vast technology of the automobile industry into a vigorous and competitive effort to improve the safety of vehicles."

The story of passive restraint technology, now some fifteen years old for automobiles, is a story initiated by the "creative energy and vast technology of the automobile industry." It is not for the Department to decide how manufacturers shall provide feasible, urgently needed passive protection to those who travel, and sometimes crash, in cars and other motor vehicles. But it is the Department's duty, as a "restrained and responsible exercise of federal authority," to no longer permit the withholding of passive restraint technology from the vast bulk of American car buyers and occupants, and to meet its clear statutory responsibility by immediately issuing the performance standard that it has so long been proposing.

Should you need additional data or material, please feel free to contact us.

Sincerely yours,

ALBERT BENJAMIN KELLEY.

ALLSTATE INSURANCE CO.,
Northbrook, Ill., May 11, 1976.

HON. HAMILTON HERMAN,
Assistant Secretary, Systems Development and Technology, TST–8, U.S. Department of Transportation, Washington, D.C.

DEAR MR. HERMAN: I had earlier received and commented for Allstate on the Safety Panel Report of the Interagency Task Force on Motor Vehicle Goals Beyond 1980.

Having since received the Report of the Panel on National, Industrial and Consumer Economics, I believe some additional comment is also required from the automoble insurance viewpoint.

The report sets out the difficulty of quantifying the costs and benefits to balance the various national goals of energy conservation, air quality improvement and highway safety. Obviously, it would be highly desirable if precise dollar amounts could be placed on all variables, the columns of costs and benefits neatly added with the mathematical results producing the proper decision.

Since this can't be achieved as a neat mathematical exercise, we must rely on common sense and judgment to reach the proper decision based upon available data. This is essential to balance our energy conservation goals with our safety goals—we cannot and need not buy fuel economy at the price of a substantial increase in deaths and injuries.

The De Lorean Study, filed with the Task Force as a part of Allstate's testimony, projects the mix of automobiles by size and weight over the next decade. This indicates a substantial switch to lighter and smaller cars in order to meet our energy conservation goals. De Lorean predicts about a 35% increase in deaths and injuries to vehicle occupants through the switch to smaller automobiles unless occupant protection is improved.

Another available fact is that belt usage does not exceed 25 to 30 percent and is unlikely to go any higher. Another fact from the Allstate test films and data presented at your hearings is that present belt systems have a limited performance capability in small cars and at higher speeds.

The De Lorean study places a mass production additional cost of $111.50 for front seat air bag system for large cars (including about $50 dealers' mark-up and manufacturers profit) and $90 for smaller two front seat automobiles (including about $40 dealers' mark-up and manufacturers profit). These are sticker prices but as standard equipment air bags would become part of the overall price

of the automobile and a competitive part of the total price. I think we all realize that under these circumstances virtually nothing sells for the full sticker price. The suppliers of air bag components who made public statements in the NHTSA Standard 208 hearings of last May generally supported the De Lorean cost figures as accurate.

De Lorean proceeded to a detailed cost benefit analysis concluding that with front seat air bags there was a definite cost benefit ratio in favor of that system and that we could have lighter, more fuel economical, cheaper and safer automobiles. That with the improved occupant protection system we could reduce deaths and injuries rather than increase them by 35%.

We also have the data from the NHTSA cost benefit analysis which clearly indicates that the air bag/lap belt system is several times more cost beneficial than present belt systems with any realistic belt usage assumptions. In addition NHTSA projects a savings of 8,900 lives and 500,000 injuries annually if air bags were standard equipment on all automobiles. This projection does not consider the switch to smaller and lighter cars and if that data were factored into the NHTSA analysis, we believe the deaths and injuries which can be prevented through an air bag/lap belt system substantially exceed the NHTSA estimates.

So common sense and available data tells us the switch to small cars to achieve energy goals will kill and maim thousands of people unless we improve occupant protection. Experience tells us the air bag/lap belt system is the available way to prevent this disastrous result.

At Allstate we have operated air bag equipped automobiles for many years and models. We started with 1972 Mercurys and have followed with 1973 Chevrolets, 1974–5 and 6 Oldsmobiles and Buicks and 1975 Volvos. These cover five different makes and five different model years.

In addition to General Motors other great names in American industry are involved in the development of air bag systems. Eaton Corporation, Allied Chemical, Thiokol, Olin Chemical and Talley Industries just to name a few. The systems are reliable and available but can be furnished at reasonable cost only through the volumes produced through installation as standard equipment. If the energy conservation requirements of the government are to force people into smaller cars, then the government must provide a safer occupant protection package for the public.

Providing the air bag/lap belt system gives the occupant the best of both worlds. For the 25% or so who will use belts they have the lap belt protection in 100% of the crash situations plus the superior protection of the air bag in the additional 65% or so of the crash modes in which the air bag is designed to inflate. For the 75% who refuse to wear belts and who currently have *no* restraint protection, the air bag furnishes automatic crash protection in about 65% of the crash modes.

If there is a possibility of getting the public to increase belt usage, it is much more likely with the lap belt than with a combination lap and shoulder belt. In addition, serious questions have arisen about the effectiveness of some current lap and shoulder belt inertial reel systems. The recent University of Michigan HSRI study indicates the lap and shoulder belted occupant of 1974 models fares little better than the lap belted occupant of 1973 models. Thus the lap belt furnished with the air bag may itself perform as well as current lap/shoulder belt inertial reel systems. Added to this is the superior protection of the air bag as a total plus.

Even when used lap/shoulder belts furnish no facial protection from flying glass and from facial or head impacts. In air bag crashes to date the bag has provided almost total facial injury protection. In fact to our knowledge none of the several crash occupants wearing glasses have even had their glasses broken.

Current lap/shoulder belt systems are not required to meet any dynamic crash testing to demonstrate their degree of injury reduction potential. No human volunteer tests of standard belts have occurred over the 15 to 17 m.p.h. range because this exceeds the pain and injury threshold. Air bag cars meet the 30 m.p.h. injury severity tests and human volunteer crashes have occurred at that speed with no injury. The public has no way to know that the reels will lock and the belts prevent injury in crash situations. To mandate belt systems without requiring dynamic performance testing and certification is a fraud on the public.

So all common sense and logic require air bag/lap belt systems as standard equipment.

Now to move to some comments on specific parts of the Task Force Report. On page 1–3 the Report states: "Advanced automobile construction techniques offer a possibility of improved crashworthiness and weight lower than present models. However, for any level of technology, increased structural strength implies a penalty in cost and fuel economy particularly noticable in small cars."

Minicars, Inc. has done a great deal of air bag development work with subcompacts and has crash-tested a number of Pinto-sized automobiles to compare belt results with air bag results. Some of these crash films were shown at your hearings.

Minicars testified before the Subcommittee on Consumer Protection of the House Commerce Committee on March 4, 1976 in the NHTSA oversight hearings. Among other conclusions based upon their research they stated:

"As the number of small cars increases to 50 percent of the car population during the next decade, the effective velocity seen by car crash victims will increase, with dramatic increases in the severity of injuries, the number of fatalities, and the losses to society as a whole.

"Advanced airbags could protect the drivers of all production cars (including subcompacts) to substantially higher velocities than lap and shoulder harnesses.

"A driver airbag restraint in conjunction with modest structural substitutions can be demonstrated to reduce the weight and costs while improving the safety performance and fuel economy of productions cars.

The examples Minicars sets forth in its statement (copy enclosed) negates the unsupported conclusion at page 1–3 of your report. We can have lighter, more fuel economical, cheaper and *safer* automobiles.

You proceed on page 1–4 to ask the question "What fuel consumption penalty are we willing to accept for improved highway safety?" The foregoing comments clearly indicate our view supported by De Lorean, Minicars, virtually the entire automobile insurance business, many consumer advocates (and we assume NHTSA) that no fuel penalty is required and your question starts from a false premise.

We wonder how sincere automobile companies are in attacking safety measures as adding weight to produce fuel penalties. Anyone who watches television has seen the Ford Motor Company ads for the Granada. These commercials point out how much quieter the ride is in the 1976 Granada compared to the 1975 Granada. And why does Ford say it's quieter? Because they proudly assert they have added 100 pounds of sound insulation to the 1976 model.

The air bag system in the 1975 Volvos in our fleet weighs about 28 pounds. Ford objects to adding air bags for a *safe* ride, partly on the basis of added weight, yet brags about adding 100 pounds for a *quiet* ride. What are our *priorities?*

* * * * * * *

Allstate also appeared and testified that we have been granting a 30% discount on no-fault and medical payments coverages since the 1974 model year and further stated that if all cars had air bags equal savings of approximately 30% could be realized on the liability coverages. We expressed the view that Nationwide's estimate of $2 billion ultimate annual insurance savings seemed reasonable. (Copy of Allstate statement enclosed.)

Also realizing the need for auto design for injury reduction and the favorable impact upon insurance costs, the National Association of Insurance Commissioners adopted a resolution in January, 1976 urging prompt promulgation of Standard 208 and installation of air bags as standard equipment at the earliest practicable date. The resolution was transmitted to Secretary Coleman and Dr. Gregory by letter of January 30, 1976 from Commissioner Rottman of Nevada, President, and Commissioner of Oregon, Chairman, Executive Committee of the N.A.I.C. (Copy enclosed.)

On page 3–88 in discussing automobile insurance you state that "Auto crashworthiness design aims at reducing the personal damage from accident and hence would affect the *size* of claim rather than the number of claims." This is not necessarily true, particularly as it affects the air bag and injury claims.

Many persons have walked away from accidents in air bag-equipped automobiles with zero injuries. In single car accidents where no collison insurance was carried for damage to the vehicle, if the air bag prevented injuries completely there would be no insurance claim at all even in a nofault state. Even in car to car accidents if no injuries resulted because of the air bag there would be

no injury claim. Thus the air bag has the potential to reduce both the *number* and size of claims.

The discussion commencing on page 4–6 of your report relating to the role of the government in personal safety relates to how much right the individual has to take personal risk and how much right the government has to limit that risk by requiring certain safety equipment on the vehicle. Unfortunately, that discussion is cast as though the buyer of the car will be the only occupant. Actually the buyer makes a decision which affects all future occupants of that vehicle. The government in its equipment requirements also makes a decision which affects all future occupants of the automobile, not just the purchaser. So the duty to provide the safest crash environment extends to all occupants and should not be solely the decision of the purchaser.

For instance I.I.H.S. studies indicate 93% of the child occupants between the ages of 3 and 10 are presently totally unrestrained. They are too young to make the restraint decision for themselves and also too young to be car purchasers. They are probably too large for kiddie seats and too small for some belt systems. Yet the air bag can provide automatic crash protection in many crash modes for these small citizens. In any event the point is that a government decision for effective safety equipment affects many vehicle occupants other than purchasers.

On page 4–15 in discussing injuries you point out that the data source was personal injury claims in which single car accidents were only 3.4% of the total whereas for all accidents they comprise 19% of the total. You say the effect of this bias is uncertain.

The effect of this bias is actually quite certain. A high proportion of single car crashes involve frontal impacts. It results in a major overstatement of belt effectiveness and understatement of air bag effectiveness. Dr. Leon Robertson of the Insurance Institute for Highway Safety has just pointed this out in a paper dated April 27, 1976 entitled "How Air Bags and Seat Belts Complement Each Other." (Copy enclosed.)

Robertson points out that lap belts are about 17% effective in frontal crashes (46% in side, rear and roll-over) and lap and shoulders belts 33% in frontal crashes (62% side, rear and roll-over). Air bags are almost 100% effective in frontal crashes so the elimination of a substantial number of single-car crashes (predominantly frontal) from your statistics establishes a definite bias against air bag performance.

On page 5–19 in discussing safety you presume that increasing crashworthiness from 30 m.p.h. to 40 m.p.h. entails greater structural weight and a substantial fuel penalty. We disagree. The Minicars and De Lorean work indicate we can with air bag passive systems achieve that goal without weight or fuel penalties. However, we don't believe even 30 m.p.h. goals can be met in most cars without air bag/lap belt systems as standard equipment. Let's consider banning some of the vinyl roofs, trim packages and the 100 pounds of extra soundproofing of which Ford is so proud, before we reduce our safety goals. And a safer and smaller car may sell a lot better than a smaller unsafe car. This statement in your report seems to say you're much more willing to pay in blood for fuel savings rather than through realistic safety and fuel economy requirements which might eliminate some of the froth. We prefer to achieve fuel savings by elimination of froth (vinyl, trim etc.) rather than by safety compromises.

In conclusion, the last air bag cars available as options are being phased out in the 1976 model year. The public is left without a safety option. If the government fails to require passive restraints as standard equipment, the public will be refused the opportunity of even a limited election and the concerted effort of the auto manufacturers to kill this great invention will have been successful. It's like discovering pasteurization and nobody will boil the damn milk. A national disgrace.

Sincerely,

DONALD L. SCHAFFER,
Vice President.

ALLSTATE,
Northbrook, Ill., May 21, 1976.

Hon. WILLIAM T. COLEMAN, JR.,
Secretary of Transportation,
U.S. Department of Transportation, Washington, D.C.

DEAR SECRETARY COLEMAN: It is now over 3½ years since the case of *Chrysler* v. *D.O.T.* was decided by the 6th Circuit finding that D.O.T. had the authority

and evidentiary support to establish a passive restraint requirement as a performance standard for future model years of automobiles.

It is now over a year since the National Highway Traffic Safety Administration held extensive hearings which we believe clearly validated the need for and practicality of a passive restraint standard.

It is also many months since John De Lorean and I visited with you in the first weeks of your term of office. He gave you his informed and independent judgments on this subject.

The D.O.T. has not acted to finalize Standard 208.

In addition to the humane aspects the recent major increases in automobile insurance rates for the injury coverages show no signs of abating.

We recently met with Ms. Connor, Mr. Herman and Dr. Jischke of your staff upon the subject of passive restraints. I'm enclosing a copy of my letter to Ms. Connor and the attached comments to the Draft Report of the Interagency Task Force on Motor Vehicle Goals Beyond 1980 which were enclosed. They make the case for air bags as we are best able to articulate it.

Thousands of lives and hundreds of thousands of injuries have resulted and will result from the delay of this decision. The importance of the issue requires that you read this material and see if it does not make a case for prompt action.

This decision must be made and must be made in favor of the need to save lives and prevent injuries.

Your consideration will be appreciated.

Sincerely,

DONALD L. SCHAFFER,
Vice President.

ALLSTATE,
Northbrook, Ill., May 25, 1976.

Hon. WILLIAM T. COLEMAN, JR.,
Secretary of Transportation,
U.S. Department of Transportation, Washington, D.C.

DEAR SECRETARY COLEMAN: We were extremely disturbed to read the news reports today of your statements in Detroit relating to further delays on the air bag issue. The delays already incurred have killed and maimed more people than the Viet Nam war.

The UPI release attributed to you the following statements:

1) That it's your decision whether or not to "order air bags on automobiles."

2) You're quoted as saying "if you order air bags on automobiles, you're increasing their cost by $300 a car."

3) You're quoted as indicating that you might mandate the use of seat and shoulder belts instead of air bags as a less costly solution.

4) That 85% use of lap and shoulder belts would be as effective as air bags.

5) The American people should be more involved in the decision.

On Point 1 your decision is not whether to "order air bags on automobiles" but whether to require crash performance standards for automobiles to prevent occupant injuries. The method of meeting those standards under law must be left to the manufacturers. You're permitting millions of cars to be sold annually without crash performance standards. So the news story misstates even the basis of the decision the law requires of you.

On Point 2 from the public viewpoint the most disturbing comment was your statement of a $300 cost. In the DOT Docket and in the personal comments he made in his visit with you, John De Lorean placed a sticker price of $111.50 on front seat air bags for a six passenger car and $90 for a four passenger car. These were sticker prices and included in the case of the larger cars $42 for manufacturers' and dealers' profit and $35 in the case of the smaller cars. Since nothing sells for full sticker price the probable sales price as standard equipment and a part of the base price of the vehicle would be less than $100 (not $300). The various suppliers of air bag equipment who testified at the NHTSA hearings last May indicated the De Lorean figures were accurate within a dollar or so. The enclosed clipping from Automotive News shows Talley Industries (which supplies part of the General Motors system) approving the De Lorean cost figures. In addition, the enclosed clipping from the St. Louis Globe-Democrat quotes General Motors that within two years or so (the probable regulatory lead time is at least this long) and with a modest additional investment, air bag prices could be reduced to $100. Again, confirming the De Lorean figures. DOT's own studies place the price at slightly over $100.

On Point 3 any inference that you have the authority to mandate the use of seat and shoulder belts is itself misleading.

On Point 4 you have no authority to force the public to achieve 85% belt usage. If this could be accomplished it should be even simpler to persuade 85% of the public to use the lap belt which accompanies the air bag. If you add the automatic crash protection of the air bag to the lap belt it is many times more effective than the lap and shoulder belt systems. However, you must deal with this problem on the basis of actual belt usage and not some pie-in-the-sky belt usage figure.

Lastly you indicate the public must help to make the decision. If the public is misinformed they're unable to make any proper decision and the statements attributed to you definitely misinform the public. In any event regulation for health and safety is not intended to be a popularity contest.

As one who had the courage to make the Concorde decision in the face of allegations that it might cause deaths and injuries, it is extremely disappointing to find you reluctant to make a decision for occupant crash performance standards for automobiles which can save thousands of lives and prevent hundreds of thousands of injuries.

Sincerely,

DONALD L. SCHAFFER.

THE SECRETARY OF TRANSPORTATION,
Washington, D.C., July 6, 1976.

MR. DONALD L. SCHAFFER,
Vice President, Allstate,
Northbrook, Ill.

DEAR MR. SCHAFFER: Thank you for your May 21 and May 25, 1976, letters urging that the decision on future occupant protection requirements not be delayed any longer. You enclosed a statement of Allstate's views on the merits of passive protection systems, and you questioned some of my statements to the Economic Club of Detroit on May 24, 1976.

On June 9, I announced a process that is designed to reach a decision on future crash protection requirements as quickly as possible. A copy of the announcement is enclosed. The document includes a notice of proposed rulemaking embodying five available courses of action, in order to permit a decision with regulatory finality at the conclusion of the hearing process. I am including your two letters and the enclosures therewith in the official docket established for this rulemaking.

The Department's assumptions on cost, safety belt use rates, and other important factors involved in the decision appear in the document. If Allstate differs with these estimates as you have with my May 24 remarks, I urge you to express your views on the subject at the public hearing and in writing on the specifics of the proposed alternatives.

I trust you will agree that the contemplated hearing and request for comments do not constitute a "popularity contest" to judge the acceptability of various occupant restraint alternatives. I believe the regulatory process benefits greatly from the involvement of consumers in decisions that so significantly affect their well-being.

Sincerely,

WILLIAM T. COLEMAN, Jr.

Enclosure.

JUNE 3 LETTER FROM RALPH NADER TO SECRETARY COLEMAN

HON. WILLIAM T. COLEMAN,
Secretary, Department of Transportation,
Washington, D.C.

DEAR MR. COLEMAN: Shortly after you took office on March 7, 1975, we met to discuss a number of issues, including the need for a speedy decision on mandating passive restraints for new cars. Present at that meeting was Dr. James Gregory, Administrator of the National Highway Traffic Safety Administration (NHTSA) who told you that the decision was moving on as fast as reasonably possible. Upon hearing Dr. Gregory's statement, you cautioned all present at the meeting that this reminded you of the Supreme Court's

requirement in *Brown v. Board of Education* to proceed with "all deliberate speed" in integrating schools and that you would not tolerate similar delays in the NHTSA's decision-making on passive restraints.

On May 19–23, 1975 the National Highway Traffic Safety Administration held extensive public hearings to review the record on passive restraints prior to making a final decision. That hearing firmly established the reliability, feasibility and effectiveness of passive restraints. More than twelve months have passed since the May hearings but no decision has been issued on the life-saving passive restraints.

On December 23, 1975, I wrote to you asking for "an explanation of what the NHTSA has done to advance the passive restraint rulemaking since the May 1975 hearings and when a decision on passive restraints will be made." On April 20, 1976, you responded that you were "attempting to seek a resolution as quickly as possible while giving all interested parties an opportunity to register their views." Is the quickness in your decision-making indicated by the four months it took to convey a six sentence reply?

Last week you assured further delays in issuing a final passive restraint standard by suggesting the likelihood of still another round of public hearings. What additional factual information could be developed by another set of hearings beyond that already developed in the extensive May 1975 hearings? If further hearings at the Secretarial level are necessary, then why did you not schedule them long before now since your year's inaction will cause another model year of cars to be produced without passive restraints and effectively condemns about 10,000 people to death over the total driving life of that model year? Further delays will condemn hundreds of thousands more individuals to death and serious injury that could be avoided if you would act now to protect the public health and welfare. Even courage is not needed to save these lives and prevent these injuries. What inverted values are pressed when the Secretary of Transportation spends far greater time on the Concorde issue than over the passive restraint standard?

There is no indication that mandatory seat belt usage (even if seat belts were as effective as passive restraints, which they are not) will ever be accepted in this country. Every indication within the last several years in this country points to mandatory seat belt usage as the straw man of those who would continue the massive carnage on the nation's highways by opposing passive restraints. Mandatory seat belt laws in Puerto Rico failed dismally and were eliminated; some state legislatures have gone on record against mandatory seat belt laws; mandatory helmet laws are being dropped in some states; the Congress is lessening your authority to apply sanctions against states which fail to comply with Department of Transportation standards; and even incentive funds for encouraging mandatory seat belt laws have been eliminated.

In view of the above and the extensive record already built on the practicality of life-saving passive restraints, diverse groups such as the National Association of Insurance Commissioners, the American Trauma Society, the Physicans National Housestaff Association, Allstate Insurance Company, the Center for Auto Safety, Consumers Union, and numerous industry suppliers such as Eaton, Yale and Towne, have gone on record in strong support of passive restraints. Yet the Secretary of Transportation, who is responsible for protecting the public health and welfare in the field of auto safety, continues to dawdle while thousands of lives are sacrificed to the auto industry, this latter day Molloch, by refusing to require passive protection for motor vehicle occupants. Instead, you add fuel to the auto industry's propaganda mill by throwing out erroneous and unsubstantiated remarks such as alleging that air bags will add $300 to the price of a new car. In sharp contrast, former GM Vice President John Z. DeLorean, using auto industry supplier figures, estimates the sticker price increase for front seat air bags at $111.50 for a six passenger car and $90 for a four passenger car. This includes $42 and $35 respectively for manufacturers' and dealers' profits on large and small cars.

When you announce your plans for making a decision on passive restraints on June 7, 1976, you would do well to remember that a major part of your mission is to protect the public health and welfare of the motoring public. Then recall that there are still 45,000 motor vehicle fatalities each year with the toll beginning to go up again as shown in the April increase, despite the little-enforced 55 MPH speed limit. Then remember the years of delay (to which you are now contributing) in mandating passive restraints, which delay has caused hundreds of thousands of needless casualties. Then announce a proposed

rule mandating passive restraints as soon as possible but no later than the 1980 model year—a shocking delay as it is from the originally proposed 1972 model year date. Conduct your public hearings on the proposed rule and stop the years of lethal indifference on passive restraints at eight.

Sincerely,

RALPH NADER.

DEPARTMENT OF TRANSPORTATION NEWS

OFFICE OF THE SECRETARY

WASHINGTON, D.C. 20590

[For immediate release, June 9, 1976]

Secretary of Transportation William T. Coleman, Jr., today scheduled a public hearing for August 3, 1976, to hear arguments prior to deciding the future of vehicle occupant restraint systems.

The Secretary also announced that the Department will propose an extension of the requirements of the present standard for one year to apply to automobiles manufactured through August 31, 1977.

Federal Motor Vehicle Safety Standard (FMVSS) 208 now requires manufacturers to provide occupant protection in vehicles by one of three options: (1) a completely passive restraint system providing protection in frontal, lateral and roll-over crashes; (2) a passive restraint system providing protection in frontal crashes combined with lap seat belts providing protection in lateral and roll-over crashes; (3) lap and shoulder belts at the front outboard positions and lap seat belts for all other positions.

In a notice of public hearing sent to the *Federal Register* today Secretary Coleman said, "The attractiveness of passive restraints is two-fold. First, it has been thought they would perform more effectively in preventing injuries than would seat belts; and, second, because seat belts are not used consistently, passive restraints, which require no action by the occupant, would ensure more widespread crash protection.

"However," the Secretary said, "the prospect of mandating passive restraints in automobiles has become increasingly controversial. Questions of effectiveness, cost, and suspected hazards, as well as the philosophical problems of restricting individuals' freedom of choice with regard to how much they pay for safety protection, have been raised by opponents of the air bag.

"It is in the context of this controversy that I must make a decision as to the future of passive restraints," Secretary Coleman said.

Secretary Coleman said he will issue a written decision on or before January 1, 1977.

He noted that because of public dissatifaction with the interlock system required by revision to FMVSS 208 in 1973, Congress in 1974 ordered that there be no requirement in the future of an occupant restraint system other than seat belts, unless the requirement is first submitted to Congress subject to disapproval by concurrent resolution.

In proposing a one year extension of the present requirements of FMVSS 208, which would have expired August 31, 1976, Secretary Coleman said that this action is being taken because of the need to provide time after the August 3rd hearing for written submissions, the time necessary to formulate and write a decision and, if necessary, the period required for Congressional review. Because of these time considerations, he said, a final resolution of any proposal to amend FMVSS 208 will not be reached until after the expiration of the present requirements, and perhaps not until substantially after January 1, 1977.

The hearing will be held at the Departmental Auditorium, Constitution Avenue between 12th and 14th Streets, N.W., Washington, D.C., from 9:30 a.m. to 12:30 p.m. and from 2:00 p.m. to 5:00 p.m. on August 3.

Participants will be permitted a maximum of ten minutes each. Additionally, written presentations may be submitted on or before September 17, 1976, to the Secretary of Transportation, Washington, D.C. 20590, indicating FMVSS 208 Hearing on the envelope.

Persons wishing to testify should notify the Secretary in writing no later than July 12, 1976.

In issuing the notice of public hearing, Secretary Coleman recommended that discussion be directed to the following issues:

—The appropriate role of the Federal Government in prescribing motor vehicle safety standards.

—The benefits and costs of alternative occupant restraint systems.

—Public acceptance of occupant restraint systems.

Secretary Coleman also outlined five possible courses of action which he will consider individually, in combination or after refinement.

These are:

1. Continuation of the present three-option version of FMVSS 208 and continuation of research directed toward developing effective passive restraint systems.

2. Continuation of the present three-options version of FMVSS 208 and a concurrent proposal for a new traffic safety standard requiring the states to adopt and enforce safety belt usage laws or otherwise achieve a usage level much higher than being experienced today.

3. Continuation of the present three-option version of FMVSS 208 while a federally sponsored field test of passive restraints is conducted with the data collected to be used in formulating a future decision on mandating passive restraints.

4. Amendment of FMVSS 208 to require passive restraint systems for all automobiles manufactured after a given date, that date to be determined primarily by the amount of lead time needed by manufacture to comply with the amended standard.

5. Amendment of FMVSS 208 to require that automobile manufacturers provide customers with the option of passive restraints in some models.

The notice of public hearing regarding amendment of FMVSS 208 is expected to be printed in the June 14, 1976 edition of the *Federal Register*. Copies may be obtained from: Office of the Secretary of Transportation, Office of Public Affairs (S–83), Washington, D.C. 20590.

STATEMENT OF CONGRESSMAN JOHN E. MOSS, CHAIRMAN, SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS OF THE COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE

Today's announcement by Secretary of Transportation Coleman of yet another meeting for the presentation of views on passive restraint safety systems, instead of a decision, is totally unacceptable. It substitutes procrastination for a policy of action to protect the driving public. It is a cave-in to industry pressure.

Public meetings on passive restraint proposals began in August 1970. Impressive documentation is available that mandatory passive restraint systems would prevent thousands of deaths and injuries. One passive restraint system would according to NHTSA, save 11,200 lives and prevent 171,800 severe injuries annually.

It is a sad commentary on the American automobile industry that the most effective and least expensive passive restraint system is the passive belt system developed by Volkswagen which would add only $31.00 to the cost of a car.

Six years after public meetings on passive restraint proposals began, we seem no closer to a decision. The Department of Transportation should move promptly to require passive restraint systems in all automobiles sold in the United States.

[From the Washington Post, June 10, 1976]

DECISION DELAYED ON AUTO SAFETY AIDS

(By Morton Mintz)

Secretary of Transportation William T. Coleman, Jr. yesterday delayed for up to five months a final decision on "increasingly controversial" automobile safety proposals.

He said that on Aug. 3 he personally will conduct a public hearing on whether to require systems to protect vehicle occupants automatically—particularly with air bags or other passive restraints such as shoulder belts that deploy when a

car's doors close. The hearing will be the fourth by the Department of Transportation since August 1969.

Proponents of the safety devices say their use could save up to 11,500 lives and prevent or reduce the severity of as many as 641,400 injuries a year.

Coleman said he will decide whether to require passive restraints or to approve any of four alternatives "on or before" Jan. 1. The date may indicate that the decision will come after the Nov. 2 election and thus be aborted as a possible campaign issue.

One of the four choices Coleman listed would be to require auto manufacturers to make passive restraints an extra-cost accessory "in some models."

Under the three other options, the present safety standard—which Coleman extended yesterday for another year to Aug. 31, 1977—would remain in effect. Nearly all cars meet that standard with lap- and shoulder-belt combinations in the front seat and lap belts alone in the rear.

The other alternatives:

- Continuing research on passive restraints.
- Forcing the states to adopt and enforce safety belt usage laws by withholding federal highway construction and safety funds from those that don't.
- Spending $50 million to $150 million for a "field test" of passive restraints.

With Coleman's approval, Dr. James B. Gregory, departing administrator of DOT's National Highway Traffic Safety Administration, had assured Rep. John E. Moss (D-Calif.) last February that the secretary would make the final decision before Congress recesses in August.

"I'm disappointed," Gregory told a reporter yesterday. Emphasizing that he had set the date in confidence that it was practicable, he said of Coleman, "He's the boss and I'm a lame duck . . . it's his decision."

Moss, chairman of the House Commerce Oversight and Investigations Subcommittee was harsher. Coleman's decision substitutes procrastination for a policy of action to protect the driving public," Moss said in a statement, "It is a cave-in to industry pressure."

Ralph Nader, a long-time advocate of air bags, charged that Coleman showed he is "an absolute coward in refusing to stand up to the automobile industry's pressure."

But Coleman, in a 43-page notice to be published in the Federal Register on Monday, said he needs to hear for himself on such issues as the government's role in setting safety standards, the benefit/cost ratios of alternative restraint systems, and public attitudes about such systems.

Saying it is "in the public interest" to set out the issues, Coleman noted that air-bag opponents have raised "increasingly controversial" questions about their cost and effectiveness and about "restricting individuals' freedom of choice" as to how much they pay for safety.

The notice, which lays out pros, cons and neutral data on the various systems, says that because the laws give Congress a role in the event DOT seeks drastic changes in the status quo, passive restraints could not be required on new cars until the 1980 models. DOT's safety agency first had proposed them for the 1972s—then for the 1974s, the 1976s, and finally the 1978s.

Recently, Volkswagen has offered door-operated shoulder belts (along with built-in lower-torso protectors) as a $31 option on its Rabbit models and has sold 30,000 of these passive restraints. Rep. Moss termed this "a sad commentary on the American automobile industry."

General Motors offered air bags as a $300 option on its luxury 1974, 1975 and 1976 models but has said it does not intend to offer them hereafter. The other domestic manufacturers have bitterly opposed the proposed passive restraint requirement.

In bag-equipped cars, a sensor inflates the devices within 35 to 70 thousandths of a second after the equivalent of a crash into a fixed barrier at 12 or more miles per hour. The cushion, which quickly deflates, is only for the front compartment, where passengers are intended to wear lap belts for additional protection. Coleman's notice dismisses allegations that the bags themselves are hazards.

If all cars were equipped with bags, and belts were worn, according to data cited in the notice, 11,200 fatalities would be prevented, and 171,800 injuries avoided or reduced annually, with an estimated saving of $4.23 billion in medical, lost-income and other costs.

Assuming 70 per cent usage of lap-shoulder combinations, the estimates are still more impressive: 11,500 fewer deaths, 641,400 fewer or lessened injuries, and savings of $4.55 billion.

While the bags provide 100 per cent protection, however, lap-shoulder combinations actually are used by only about 20 per cent of those who have them. DOT's estimate is that voluntary methods cannot achieve a use rate higher than 40 percent.

As standard equipment, bags would cost $190, or $130 more than lap-shoulder belts, the safety agency estimates. The DOT notice figures that car sales would decline by 1 per cent for each 1 per cent increase in a car's price, but says safety advances would leave people with more money to spend and consequently could stimulate sales. Insurance premiums alone would be reduced by $1.6 billion a year, according to an estimate Coleman cited.

JUNE 10, 1976.

MR. RALPH NADER
Washington, D.C.

DEAR RALPH: I thought the days when a man proved he was not a coward by having a fist fight on the corner were long over. Often restraint by an artist is a great characteristic and I am sure that there are occasions when a man proves he is not a coward by exercising restraint.

The passive restraint issue has been before me and as I was attempting to comprehend all the issues and the facts I found that there were many unanswered questions. As a private practicing lawyer I found that one would often be successful if he mastered the facts and I also found in civil rights litigation that a mastery of the facts often led to victory.

Since I have held public office I have had two alternatives: to read papers placed before me and unless I can find a glaring error sign them; the other is to study papers placed before me, ask for briefings, and then talk to all groups involved including the consumer interests. If these conversations leave me with the unsettling feeling that I have not received all information and that the issue is still open to debate, I find the only way to handle the problem is to conduct personally a public hearing. This is what happened with respect to the passive restraint issue. I hope I can demonstrate to you that I was not and am not a coward.

As ever,

WILLIAM T. COLEMAN, JR.

HOW AIR BAGS AND SEAT BELTS COMPLEMENT EACH OTHER

(By Leon S. Robertson, Ph. D., Insurance Institute for Highway Safety, April 27, 1976)

Briefing paper presented to Judith T. Conner, Assistant Secretary for Environment, Safety and Consumer Affairs, U.S. Department of Transportation and Hamilton Herman, Assistant Secretary for Systems Development and Technology, U.S. Department of Transportation.

The public debate about how best to protect vehicle occupants in crashes has often centered on the relative merits of air bags and seat belts. It is too often assumed that if seat belt laws could increase belt use to 70% or so, there would be no need for air bags. However, the research evidence indicates that both air bags and seat belt use laws are needed because the sets of injuries they each prevent are only partially overlapping.

Air bags are designed to inflate in severe front and front-angle crashes—reducing crash forces by spreading them over a larger area of the body than belts and providing more space and time for the body to decelerate. Shoulder belts are designed to do the same but they do so less effectively than air bags because they concentrate the decelerative forces over a smaller area, involve more abrupt deceleration, and are not in use by three-quarters of drivers.

Belts are most effective in crash modes where air bags would have little or no effect. Table 1 presents data on injuries in crashes extracted from a study of 1973–75 model cars in towaway crashes, the only available study of three-point belt effectiveness in North America. Lap belts reduced severe injuries only 17 percent in front and front-angle crashes compared to 46 percent in side, rear and rollover crashes. Lap and shoulder belts in combination reduced severe injuries only 33 percent in front and front-angle crashes compared to 62 percent in side, rear and rollover crashes. The data in Table 2 indicate similar findings in other studies that have separated frontal from other crashes. Belts are consistently less effective in frontal than in other crash modes.

It is clear that even when used, belts do not provide sufficient protection in frontal and front-angle crashes. For this reason as well as the several reasons cited previously, regulation mandating at least the crash protection performance that can readily be provided by present air bag systems is essential. Air bags should be supplemented by belts, and laws mandating belt use are needed praticularly to reduce injuries in other crash modes.

TABLE I.—INJURIES (AIS ≧ 2) BY TYPE OF CRASH AND BELT USE—TOWAWAY CRASHES OF 1973–75 MODEL CARS[1]

	Front and front angle crashes			Side, rear, and rollover crashes		
	Unbelted	Lap belted	Lap and shoulder belted	Unbelted	Lap belted	Lap and shoulder belted
Percent injured	12	10	8	13	7	5
Number of occupants involved	3,514	964	1,456	2,544	851	1,429

NOTES

Front and front angle crashes:
Percent effectiveness of lap belt only equals 12–10 over 12 equals 17 percent.
Percent effectiveness of lap and shoulder belt equals 12–8 over 12 equals 33 percent.
Side, rear, and rollover crashes:
Percent effectiveness of lap belt only equals 13–7 over 13 equals 46 percent.
Percent effectiveness of lap and shoulder belt equals 13–5 over 13 equals 62 percent.

[1] Adapted from table 3, p. 10 in Donald W. Reinfurt, Claudio Z. Silva, and Yosef Hochberg, "A Statistical Analysis of Seat Belt Effectiveness in 1973–75 Model Cars Involved in Towaway Crashes", University of North Carolina Highway Safety Research Center, October 1975.

TABLE 2.—CLAIMED BELT USE[1] AND EFFECTIVENESS IN FRONTAL CRASHES

Author(s)	Belt use claimed		Percent fatals		Estimated percent effectiveness		Percent serious injury		Estimated percent effectiveness		Comment
	Number	Percent	Belted	Unbelted	Frontal	Total	Belted	Unbelted	Frontal	Total	
Campbell, 1968	367/3, 504	10	(2)	(2)	(2)	(2)	9.5	9.6	1	34	Lap belts, 1967 crashes.
Council and Hunter, 1974	455/2, 594	18	(2)	(2)	(2)	(2)	8.1	12.0	33	51	Predominately lap belts, 1970 crashes.
Kihlberg, 1969	984/5, 719	17	0.7	1.1	36	40	7.4	12.7	43	49	Lap belts, 1966–67 crashes.
Levine and Campbell, 1971	1, 489/8, 662	17	(2)	(2)	(2)	(2)	4.7	8.7	46	48	Lap belts, 1966 and 1968 crashes.
Palmer and Toomath, 1972	190/500	38	2.1	3.9	46	59	7.9	17.1	54	69	Predominately 3 point belts, New Zealand 1971–72.
Tourin and Garrett, 1960	491/4, 553	11	(2)	(2)	(2)	(2)	4.2	3.6	17	28	Lap belts in crashes during 1950's.

[1] No study adjusts for possibly inflated claims of belt use by less injured occupants which can inflate belt effectiveness estimates substantially.

[2] Data not given in the report.

STATEMENT OF FORD MOTOR COMPANY

I am John C. Eckhold, Director of the Automotive Safety Office of Ford Motor Company.

I am here this morning to present the views of Ford Motor Company regarding requirements for crash protection under Standard 208 and considerations relative to possible mandated installation of passive restraint devices in passenger cars and in light trucks and multi-purpose vehicles.

As requested in the Administrator's letter of April 18, 1975, inviting Ford to address this meeting, we shall file a written submission covering the questions that were attached to that letter.

Initially, I want to establish two premises on which these remarks are based. First, issues associated with Standard 208 are not questions as to whether the number of injuries and deaths resulting in traffic mishaps should be reduced. I'm sure everyone in this room is in agreement with that goal. Rather, the issues relate to the question of how best to accomplish that objective and with what regulatory scheme, considering all factors involved.

Second, in the Administrator's letter of April 18, the statement was made that the "NHTSA has undertaken rulemaking to amend its Standard No. 208 to require occupant crash protection that is 'passive', i.e., requires no action by vehicle occupants such as fastening a seat belt". I believe that it is important to speak to this statement at he outset. Systems using belts that would operate automatically have been discussed and may have some potential application in smaller cars having only two front passengers. If the requirements are to apply to all vehicles, however, the only system that holds potential for universal application is the air bag. We believe it is now generally accepted that lap belts which the user himself must fasten must be used with air bags, if he or she is to have protection substantially equivalent to that offered by the present lap and shoulder belt system. Given air bags as a restraint device, the proposed rulemaking is not truly a "passive" system but more properly should be identified as an "active-passive" system. An "active" seat belt is a vital part of the proposed standard and does not differ from the lap belt requirement in today's cars; the air bag, or "passive" portion of the standard is actually a replacement for the current shoulder harness.

It is also clear that, were such "passive" devices to be required as part of the restraint system, most of American automotive consumers would have to pay significantly increased costs for a particular device—the air bag.

Further, a complex and costly device that would be a significant addition to each of the millions of vehicles the American people buy each year most certainly should not be required without assurance that all implications of the step have been carefully considered.

Is that the case with the air bag? We think not.

We think the answers to four rather fundamental questions in this issue make the point.

First: Has the new system been proven?

Ford Motor and others have been conducting field tests of air bag restraint systems in full sized cars for the past three years. In these tests, involving hundreds of cars and millions of miles of travel, there have been 55 reported deployments of the air bags in accident situations, nine of them in Ford cars, and many of these have been low-speed accidents that did not test the full capabilities of the systems to save lives. There were only two high-speed crashes in Ford-built vehicles in which the bags deployed, one occupant escaped serious injury and one was killed.

The Ford field test revealed generally good reliability for an experimental system, with about 5 percent repaired or replaced. There were no known system malfunctions in accident situations, nor any occurrences of inadvertent deployment.

Is field experience to date sufficient to justify requiring installation of such systems on all new cars and light trucks? Should 55 air bag inflations flash the green light for tens of millions of installations? We think not. Indeed, the Administration's own evaluation has concluded that the casualty reducing effectiveness of air bag restraints cannot be analyzed from field data because of the small number of air-bag equipped cars on the road.[1]

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[1] SAE paper 750190, February 24–28, 1975.

Further, and as fundamental, NHTSA has not, even to this date, met the basic requirement for compliance test procedures that are sufficiently objective to assure comparable test results when performance of the system is tested by different agencies. We have tested the system in 33 crashes of Mercury's against barriers at three test facilities—two of which are independent laboratories—and have found substantial inconsistencies in the test results that are traceable principally to deficiencies of the test device specifications and in the test procedures when tests are run by different testing agencies.

Second: Have alternatives to the active-passive restraint system (air bag) been fully explored or exploited?

Repeatedly, witnesses before governmental agencies have pointed out the wealth of data that confirm how highly effective lap-and-shoulder belt combinations are in preventing death and injuries in actual highway crashes. Today three-quarters of all cars on American roads have lap and shoulder belts, and nine out of ten have at least lap belts.

The potential for immediate increases in lifesaving, if these devices were to be more widely used, is incontestable. They are in place, available, relatively foolproof, paid for and effective.

Ultimately, the main question to which the air bag proposal is addressed comes down to is how to protect those who refuse to use the active belt systems.

We believe that equity demands that the burden of protecting the careless should be placed on the careless—by requiring them to buckle up. It is not equitable to force responsible drivers and riders to pay a large price for benefits that accrue mainly to the irresponsible.

Laws to require the use of seat belts have been enacted in 12 countries, and, where experience has been reported, have proven very effective in reducing serious injuries and preventing deaths. To our knowledge only in Puerto Rico, which has such a law, but does not rigorously enforce it, have results been disappointing. Yet in spite of overwhelming evidence that seat belt wearing laws are effective, no state in this country has yet seen fit to enact legislation requiring that the lifesaving device be used.

Ford Motor Company has been pressing for three years for mandatory belt usage laws, with limited results—many bills introduced in state legislation but none became law.

Regardless of what may be required in the way of new restraint systems, the fact remains that the majority of cars operated on American roads for many years to come will be equipped with belt restraints.

Shouldn't the National Highway Traffic Safety Administration be prominent in pressing for national seat belt usage legislation? With much of Europe, as well as Israel, Australia and New Zealand, already having mandatory seat belt usage laws, should not the position of those that insist passive restraints are the only "right" solution be reassessed?

Third question: Would the system be economically feasible?

For the consumer, we calculate that the imposition of air bag restraints would mean an added retail cost of about $180 per car, without any profit to the vehicle manufacturer. In a 10 million plus car year, that would mean the American consumer would pay about $2 billion for the air bag.

He might well ask himself if this is the kind of help he needs from his government, especially if he knows that the air bag with a lap belt offers him protection about equivalent to the present seat belt systems. He might also question what the complicated new device might require in terms of long-term maintenance, or repairs to his car in the event of deployment of the air bags. NHTSA estimates the replacement cost to be $350 per car but conclude that the cost of replacement over an average car's lifetime is "only" 3 percent of the original air bag system cost. The individual consumer who ends up paying the bill will find little comfort from this average.

In addition, it should be noted that the most recent proposal also has other requirements, such as those related to side impact tests, that could add another $38 per car for a total of $218.

From our perspective, the air bag offers several depressing possibilities at an already depressed time.

Not only would the higher price of the car or truck caused by the air bag depress sales, but financial commitments to the effort also would have to be made by the manufacturer well in advance of the sales. And the amount would not be small. Ford calculates, based on present economics, that its requirements would demand expenditures of over $400 million for passenger cars and light trucks.

Ford alone has invested more than a billion dollars during the last five years to meet vehicle-related safety, damageability and emissions requirements. During this same period, we have spent nearly $2 billion to develop new small cars and expand our small-car manufacturing and assembly capacity for the North American market.

By 1980, we expect to spend an additional $2 billion on more efficient car designs that will be lighter in weight, will make better use of interior space, and that will provide better fuel economy.

The need to meet these market demands and governmental requirements has forced Ford to establish priorities for the use of available capital and manpower. Because of the magnitude of the investment required, we have not made provision for the major structural changes and re-packaging of components that would be necessary for installation of air bags.

In the six months ending March 31, 1975, Ford lost $205 million before taxes. Much of the loss is attributable to depressed sales. But I hope you also are aware that the decline in sales is due in part to increased prices; and that a significant part of those price increases was caused by other government requirements for safety, damageability and emissions equipment. Moreover, in today's depressed vehicle market, it has been impossible to increase prices sufficiently to recover fully increased costs for labor, materials and government-mandated equipment, and this has also contributed to the decline in earnings.

I raise these points for only one reason—to point out the potential effect of a policy direction apparently predisposed to mandating passive restraints. It is in the consumer's pocketbook and the health of the economy that the cumulative effects of various federal vehicle regulations come together. Ford believes that regulatory agencies cannot serve the public interest if they consider the effects of their actions in isolation and ignore this cumulative effect.

Now a fourth question: Would adoption of the latest proposal be in the public interest?

If the active-passive restraint system was the only way to reduce traffic injuries and deaths significantly and would do so shortly after the effective date of new requirements, the answer might be in the affirmative. However, neither premise is correct. Enforcement of a mandatory belt wearing law would satisfy both conditions—air bags would not.

Further, the proposed requirements would have the effect of running diametrically opposite to the efforts to get weight out of cars to help make them more fuel-efficient.

On an average Ford car, we estimate that the air bag modules and associated changes would add 31 pounds. On the smaller cars we estimate the weight implications of providing the hardware required to meet side-impact tests could be proportionaly very large—almost 90 pounds in addition to the air bag weight. The average car weight increase for side impact requirements could be as great as 50 pounds.

Ford has a continuing program of weight reduction, and over the next few years will undertake substantial redesign of its vehicles.

We have committed to the President and the Congress that we will meet a goal of 40 percent better fuel economy by 1980, given the premise of no government-mandated requirements that would result in weight increases in excess of 100 pounds per average car and no changes in that time to today's government emissions requirements. The implications of FMVSS 208 on this effort are obvious.

We think the answers to all four questions are in the negative.

It did not escape our notice on April 28—and I am sure it did not escape yours—that the President talked to the U.S. Chamber of Commerce about what he called "hidden taxes" on the American people.

"The central issue here is the need for a proper assessment, or evaluation, of costs and benefits," the President said, adding:

". . . we do not seek to eliminate all regulations . . . But we must know their cost and measure those costs against the good that the regulations seek to accomplish."

That, we think, is good public policy.

In speaking to you about how we view this proposed regulation, it is not enough for us simply to state our opposition to what is in the Docket. We believe it is incumbent on us, if we want the right to oppose, to meet a balancing obligation to propose.

We believe there is a better way to achieve the results you want with FMVSS 208. Your goal, shared by all in this room, is to save lives and reduce injuries.

That goal can be achieved, in our view, without false starts, hidden taxes or wasted investments.

Ford recommends the following five-point program. It is designed to provide what we see as necessary information to bring about a quick reduction in highway deaths and save the American people billions of dollars.

First, a thorough and wide-ranging consumer research project should be conducted by a competent independent agency. Both the NHTSA and the automotive industry need to know why more people do not use life-saving belt systems and what they dislike about them. But more importantly, what does the consumer want? A lap belt and shoulder harness system or a lap belt and air bag combination and at what price. Such a survey could also determine support for mandatory seat belt usage.

Second, NHTSA should institute a national accident data collection system specifically designed to produce representative information regarding accidents, injuries and fatalities. Such a system would create a body of knowledge allowing for increasingly accurate cost/benefit analyses to be conducted, and would be invaluable in seeking new solutions to the problems of highway safety.

Third, we believe stricter enforcement of the nationwide 55-mile-per-hour speed limit should be undertaken—for reasons of fuel conservation, as well as safety—and we are pleased that NHTSA has adopted this stance. Research shows that while the average speed on the nation's highways has dropped 12 percent, about half the drivers on the major highways still exceed the limit. Rigorously used, federal government leverage on highway fund grants could bring about much better support by state and local governments. Why aren't we courageous enough to use government pressures to change behavior in ways that are proven to work, instead of using it to force car prices up $200–$300 or more without any assurance that the results will be proportionately beneficial?

Fourth, we believe the NHTSA should undertake an immediate national campaign for mandatory seat belt usage laws, as supported by the Secretary of Transportation last year. Ford would support this move, as would many others, Even though past efforts to convince state legislators of the wisdom of such laws have been unsuccessful. Again, grants of certain federal funds might be made dependent on cooperation.

Fifth, and finally, we would like to see all proposals for passive restraints set aside until the Administration can conduct an adequately large field test of air bags in service. It has been suggested the test should be government financed and supervised. We believe the program should examine the acceptability not only of the system itself, but also the consumer's willingness to pay for it.

Ford Motor Company would cooperate fully in the development of such a government-sponsored effort to determine, from actual experience on a wide scale, whether the projected benefits attributed to the airbag will materialize. If the program could be established on mutually acceptable terms, Ford would participate in furnishing some portion of the vehicles for the evaluation.

This concludes my statement.

APPENDIX II

Documents Relating to NHTSA Regulatory Reform and Benefit Cost Analysis

1. Memorandum, DOT Executive Secretary to Heads of Operating Administrations, November 17, 1975 with attachment "Internal Regulatory Reform."
2. Memorandum, Stephen G. McConahey to John W. Barnum, on "Regulatory Reform Matters," December 8, 1975.
3. Office of the Secretary, Notice, Policies to Improve Analyses and Review of Regulations; Regulatory Reform, Issued April 13, 1976.
4. Office of the Secretary, News, Policies to prevent DOT regulations from imposing unnecessary costs on industry, consumers and government. April 30, 1976.
5. Letter, John E. Moss to Honorable William T. Coleman, Jr., May 17, 1976; Letters, July 1, 1976 between Congressman Moss and Secretary Coleman.

Memorandum

Department of Transportation,
Office of the Secretary,
November 17, 1975.

Subject: The Secretary's Meeting with the Administrators—November 19.
From: Executive Secretary.
To: Heads of Operating Administrations.

The next meeting will be held Wednesday November 19, at 9 a.m. in the Secretary's office.

The Agenda:

1. Internal Regulatory Reform. Attached is a paper that will be the basis of the discussion. It includes proposals and questions to which the discussion will be addressed.
2. Mr. Dow will report on FAA's solicitation of public comments on its regulations and its concommitant annual public "gripe session."
3. Davis-Bacon Act.
4. Departmental coordination of the current Legislative Effort.
5. Status of the development of State of the Union Initiatives.

* * * * * * *

The minutes of the last meeting are attached.

A. B. Virkler Legate.

Internal Regulatory Reform

The Secretary has reviewed the report of the Task Force on Regulatory Reform. This task force was established under the direction of the Deputy Secretary to review current DOT practices in making regulatory decisions, including the role of *economic analysis*, and to suggest improvements in these practices.

With few exceptions, there are no legislative restrictions on the use of economic analysis in the development of regulations. Indeed, economic analyses are being conducted today in nearly every area the modes regulate. However, there remains a need to: (1) improve the quality of our economic analysis, (2) assure its early input into the process of regulation development, and (3) encourage its fuller use. In addition to these needs, we must (4) ensure the timely involvement of OST in the development of those regulations which have a significant impact or are especially controversial and (5) provide for regular and effective review of the regulations already in effect.

Meeting these objectives raises the question of the degree to which it is necessary or desirable to require OST review and approval of modal regulatory deci-

sions. At one extreme, one could establish a regulatory clearing process (modelled, say, on the legislative clearing process) while at the other extreme OST involvement could be left to the discretion of the modes. Neither extreme is attractive. In the former case, OST in effect duplicates much of the work of the modes requiring additional resources and inviting bottleneck problems. The latter case describes the current situation, which is unsatisfactory. The proposal put forward by the Task Force calls for the establishment by the Secretary of DOT policy guidelines to meet the above-mentioned objectives, leaving full responsibility with the modes to carry out the policy. Specifically, the proposed policy guidelines are:

1. *Unless explicitly prohibited by law, all offices of DOT must, prior to issuance of a notice of proposed rulemaking, conduct an analysis of the costs and benefits of the proposed rule* and use such results as are developed in assessing the need for promulgating the proposed rule. [Emphasis supplied.]

2. For those rules that are potentially costly or controversial, a brief memorandum be sent to the Secretary prior to publication of the NPRM which describes the proposed rule, the alternatives considered, the bases upon which the rule was developed, the results of the economic analysis of the rule, an assessment of the positions of interested parties with respect to the rule, an assessment of the consumers' interests in the rule, and such additional information as may be required to apprise the Secretary fully of the potential impact of the rule.

3. Each mode establish a process by which the major interest groups affected by that mode's regulations are provided with a regular opportunity to offer comments on existing regulations for the purposes of determining whether existing regulations are wasteful, unnecessary, or should be revised.

These proposals address important aspects of internal regulatory reform and provide a basis for a Departmental policy.

Beyond the objectives addressed by the above proposals, there are other issues surrounding internal regulatory reform which must be addressed; specifically,

1. To what extent do our procedures assure that the consumers' interests prevail? How do we assess the acceptability of our regulations by special interest groups, the Congress, the general public? Are cost-effectiveness measures adequate indicators of the consumers' interests? Do our procedures ensure that we do not weaken the public belief in an equitable and efficient regulatory system?

2. How effective are DOT's ongoing processes for collecting and reviewing data in order to monitor and evaluate the cost-effectiveness of standards already promulgated? Are we prepared to make prompt modifications based on experience?

3. How well do we coordinate our regulatory activities with other agencies of the Federal government? What can we learn from other agencies about economic analysis and procedures for regulation and standard development?

4. How do we ensure the feasibility and practicability of our regulations? Does practicability require ensuring the reliability of equipment designed to achieve compliance with a regulation, say, by field testing?

5. How should criteria governing cost/benefit analyses in economic regulations differ from criteria applied to regulations that are concerned with safety, environmental protection, or social objectives? Do we effectively weigh the benefits of worthwhile social goals against their economic cost to the Nation as a whole?

6. How do we compare the costs and benefits of different programs? For example, do we compare the economic costs of saving lives through improved highway design, reduced speed limits, or air pollution control? Similarly, how do we compare the benefits and costs of noise and safety in specifying aircraft flight procedures?

THE WHITE HOUSE,
Washington, December 8, 1975.

Memorandum For: John W. Barnum, Deputy Secretary, Department of Transportation.

Subject: Regulatory Reform Matters.

I'm writing this memorandum to request your attention on two items related to regulatory reform:

1. DOT Internal Regulatory Reform.—As you know, December 31 is the deadline for a report to the President indicating what steps DOT has taken to im-

prove its regulatory reform process. Earlier in the year, OMB did approve a written outline of your recommendations. However, recently I have seen a number of NHTSA proposals for additional regulations. In addition, I have received complaints from some groups that proposed regulations by NHTSA have not followed an adequate test procedure—one case in point being the requirement for seat belt anchors in school buses. I do not have adequate evidence to substantiate these claims one way or the other. However, they do point to the importance of ensuring that a full evaluation of benefits and costs is made prior to issuance. I would appreciate receiving an update on where the internal regulatory reform project stands. If you are in the process of submitting your report to the President, there's no need for an additional report to me. However, I do hope that your final report does include specific instances where the revised process has been applied to proposed regulations issued since the time you have received OMB's approval of your process outline.

2. Domestic Airline Assistance Program.—Bob Binder has indicated to me that he has been exploring possibilities and options for a set of actions aimed at improving the economic conditions of domestic airlines in a way similar to the efforts undertaken in response to the Pan Am crisis. Bob indicated to me that his discussions have been preliminary and in an effort to outline "possible" actions that the Federal Government could take. I'm concerned that this effort could fly in the face of the regulatory reform posture taken by the Administration. Therefore, I hope that before long we could discuss the direction that this effort is taking. In the interim, I would appreciate receiving your perception of this project and its timetable for recommendations.

STEPHEN G. MCCONAHEY,
Associate Director, Domestic Council.

[From the Federal Register, Apr. 16, 1976]

DEPARTMENT OF TRANSPORTATION, OFFICE OF THE SECRETARY

[Notice No. 76-5]

POLICIES TO IMPROVE ANALYSIS AND REVIEW OF REGULATIONS

Regulatory Reform

Comprehensive regulatory reform is a major policy thrust of President Ford. In the past the Department of Transportation has developed legislation to bring needed changes to Federal economic regulations governing the air carrier, railroad, and motor carrier industries. We must also take steps to ensure that regulations issued by the Department itself are sound and do not impose unnecessary burdens on the private sector, on consumers, or on Federal, State, and local governments.

The operating elements of the Department (e.g., Coast Guard Federal Aviation Administration) have already made some important improvements in their regulatory procedures. The strength and integrity of our regulatory framework depends on maintaining responsibility for formulation of regulatory policies in the operating elements where expertise and experience are concentrated.

At the same time, there is a need for a Department-wide effort to reinforce these initiatives and to carry out our overall Departmental responsibilities. Our regulatory proposals are ultimately the responsibility of the Department as a whole. We must be certain that they are supported by adequate analysis of their anticipated costs and consequences before they are proposed or finalized.

Furthermore, the Department is charged with taking a broad view of the impact of government regulations on all transportation modes. While uniformity is not always possible or desirable, we must be sure that the overall direction of our policies is consistent and that our regulations do not cause unnecessary distortions to the competitive opportunities of the various modes of transportation.

Recognizing the importance of fulfilling our broad responsibilities without impairing initiative in the operating elements, I have promulgated three internal Departmental policies (which appear below) designed to improve analysis and review of regulations. They are effective May 1, 1976, except for proposals whose development is essentially complete on that date.

The objectives of these Department of Transportation policies are:

1. To improve the quality of analysis of regulatory proposals and of signficant grant program requirements, with particular emphasis on consideration of their costs to the private sector; to consumers; and to Federal, State, and local governments;

2. To assure the full and early use of such analysis in the development of these proposals and requirements;

3. To provide for the timely involvement of the Office of the Secretary in the development of those regulations which are expected to have a substantial impact or to be especially controversial; and

4. To provide for regular and effective review of existing regulations and grant program requirements.

Issued in Washington, D.C., on April 13, 1976.

WILLIAM T. COLEMAN, Jr.
Secretary of Transportation.

DEPARTMENT OF TRANSPORTATION POLICIES TO IMPROVE ANALYSIS AND REVIEW OF REGULATIONS

POLICY I

Prior to the issuance of a Notice of Proposed Rulemaking, the originating Departmental element shall evaluate the anticipated impacts of the proposed regulation, use the evaluation results in assessing the desirability of proposing the regulation, and include a brief summary of the evaluation in the Notice of Proposed Rulemaking. Each evaluation shall include an estimate of resulting costs to the private sector, to consumer, and the Federal, State, and local government as well as an evaluation of benefits and other impacts, quantified to the extent practicable. Prior to the issuance of a final regulation, the originating Departmental element shall prepare a similar evaluation, use its results in formulating the regulation, and include a brief summary of the evaluation in the publication of the final regulation.

Prior to the adoption of administrative requirements associated with grant programs not issued as Notices of Proposed Rulemaking which involve important policy changes or are expected to result in significant costs to Federal, State, or local government, to the private sector, or to consumers, the originating Departmental element shall evaluate the anticipated impacts of the requirement and document the results. Each evaluation shall include an estimate of resulting costs to the private sector, to consumers, and to Federal, State, and local government as well as an evaluation of benefits and other impacts, quantified to the extent practicable.

An evaluation is not required if the grant program requirement, or publication of the proposed regulation, is expressly mandated by statute, or if the head of the originating Departmental element determines that the expected impact of the proposed regulation or grant program requirements is so minimal that the proposal does not warrant an evaluation. Whenever a determination of minimal impact is made, the head of the originating Departmental element shall provide written notification to the Secretary.

POLICY II

For those regulations which are potentially costly or controversial, the head of the originating Departmental element shall provide the Secrtary with an information memorandum at least 30 days prior to the publication of the Notice of Proposed Rulemaking. The information memorandum shall explain briefly the need for the regulation, the substance of the regulation, alternatives considered, and the results of evaluation of the proposed regulation. It shall also summarize the anticipated positions of interested parties, assess consumers' interests, address technological feasibility as appropriate, and provide such other information as is needed to apprise the Secretary of the anticipated impact of the regulation.

In addition, at least 30 days before the final issuance of any regulation which is potentially costly or controversial, the head of the originating Departmental element shall provide the Secretary with an information memorandum advising the Secretary of the impending action.

POLICY III

Each element of the Department shall establish a system by which those affected by its regulations and significant grant program requirements are provided an opportunity periodically to offer comments, through a structured process, with a view toward assessing whether existing regulations or grant requirements are effective or necessary, or need revision to accommodate changed circumstances and requirements.

Discussion of policy I. The purpose of this policy is to assure that the consequences of regulations and of significant grant program requirements are adequately considered early in their development. The policy specifically requires that an estimate be made of resulting costs to government, the private sector, and consumers and that other consequences be quantified to the extent practicable.

The policy is intended to allow the heads of Departmental elements to determine how to integrate this requirement effectively with existing regulatory procedures. It is intended to encourage comprehensive review processes within the operating elements.

Judgment should be exercised by the head of the Departmental element so that resources and time devoted to analysis reflect the importance of the proposal. Many proposals will not justify a highly sophisticated analysis. The policy is intended to encourage the use of Advance Notices of Proposed Rulemaking and Policy Development to gather information on which to base an evaluation, as reflected in the Department's proposed Consumer Representation Plan.

Regulations which fall within the emergency rulemaking provisions of the Administrative Procedure Act (5 U.S.C. 553(b)(B)), and which therefore are not issued as Notices of Proposed Rulemaking, are excluded from this requirement of prior evaluation but should be given the same evaluation as soon as practicable.

Significant grant program requirements not issued as Notice of Proposed Rulemaking are included in the policy because they may have major policy and cost implications. This policy does not apply in situations where the authorizing statute does not allow the Department any discretion in the substance or impact of the requirement.

Publication of summaries of the evaluations of regulatory proposals is required to provide a starting point for constructive debate about the final adoption of the proposals.

Discussion of Policy II. The policy is intended to afford the Secretary an opportunity to review regulatory proposals of substantial impact in light of the Department's overall responsibilities before they are proposed. The broad terminology of the policy is intended to allow the heads of Departmental elements to judge when the anticipated impact of a proposed regulation warrants notification of the Secretary. Examples of factors which could be considered in making that determination are substantial public or Congressional interest in the proposal; anticipated impact on other transportation modes or on the activities of other Federal agencies; considerable burdens on State or local governments, on a particular industry, or on consumers; or anticipated requirement of significant additional Federal resources.

Administrative requirements associated with grant programs which are not issued as Notices of Proposed Rulemaking are not included in the policy because present arrangements by which Departmental elements confer with the Office of the Secretary prior to adoption of such requirements are working well.

A 30-day notice requirement has been adopted to allow the Secretary to become involved in the development of a proposal if he deems it appropriate.

If an initial determination is made that a memorandum for the Secretary is not warranted but later information indicates that the proposal will have costly or controversial impacts, a memorandum should be provided whenever such anticipated impacts become known. In any event, a memorandum for the Secretary should be provided 30 days before a costly or controversial regulation is finally adopted.

Discussion of Policy III. The intent of this policy is that the Department's existing regulations and significant grant program requirements be reviewed in a systematic way to assure that they continue to be sound, that they do not impose unnecessary burdens on the private sector or on government, and that they are revised as expeditiously as possible in response to changed circumstances. It is

intended that the interests of consumers as well as those of affected industries and of government be represented in these reviews. To implement this policy effectively, it may be appropriate to restrict the occasion for comment to discussion of a limited number of regulations or program requirements that appear to be especially in need of review.

[FR Doc.76–11128 Filed 4–15–16;8:45 am]

DEPARTMENT OF TRANSPORTATION

[For release Friday, April 30, 1976]

Policies to prevent DOT regulations from imposing unnecessary costs on industry, consumers and government have been initiated by Secretary of Transportation William T. Coleman, Jr.

"The new policies on departmental regulation respond to President Ford's expressed concern that government regulation is too burdensome and too costly," Secretary Coleman said.

"While we are spearheading the effort to bring about regulatory reform of the transportation industries, we shall at the same time exert no less effort to reform the regulatory reform process within our department," the Secretary said. "These policies will reinforce efforts already being made by the department's administrations to improve the effectiveness of our regulations."

The new policies, which become effective May 1, 1976, require:

- Administrators to calculate and consider costs to consumers, the private sector and government, as well as other impacts, *before* proposing new regulations, and that a summary of such analysis be published in the *Federal Register* when the regulation is proposed.
- Administrators to notify the Secretary of the need for, and the substance and anticipated consequences of costly and controversial regulations at least 30 days before they are proposed.
- Each element of the department to establish a systematic means of reviewing existing regulations to assure they remain effective and justifiable.

The complete text of the new policies was printed in the *Federal Register* of April 16, 1976.

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATION, OF THE
COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE.
Washington, D.C., May 17, 1976.

Hon. WILLIAM T. COLEMAN, Jr.,
Secretary of Transportation,
Washington, D.C.

DEAR MR. SECRETARY: This Subcommittee notes with interest the publication in the *Federal Register* of a notice signed by you on April 13, 1976, entitled "Policy to Improve Analysis and Review of Regulations, Regulatory Reform." If we understand these policies correctly, they require, with certain exceptions, the preparation of a cost-impact evaluation by administrative units of the Department of Transportation prior to the publication of notices or proposed rulemaking, and require further submission to the Secretary of Transportation of an "information memorandum" at least thirty days prior to the publication of a notice of proposed rulemaking, in the case of "those regulations which are potentially costly or controversial."

This Subcommittee, which has been assigned oversight responsibility for the National Highway Traffic Safety Administration, is concerned with the impact of these new policies on NHTSA's program of Federal Motor Vehicle Safety Standards. In particular, we wish to assess the conformance of these policies with the statutory criteria for rulemaking set forth in the National Traffic and Motor Vehicle Safety Act of 1966.

To aid the Subcommittee in this regard, can you please insure that the Subcommittee is supplied on a regular and timely basis with the evaluations and information memoranda referred to above. In particular, we request that NHTSA be directed to supply this Subcommittee with copies of information memoranda

for those regulations which are potentially costly or controversial, at the same time it transmits these memoranda to you under Policy II of your notice.

Thank you for your attention to this matter.

Sincerely,

JOHN E. MOSS,
Chairman, Oversight and Investigations Subcommittee.

THE SECRETARY OF TRANSPORTATION,
Washington, D.C., July 1, 1976.

Hon. JOHN E. MOSS,
Chairman, Subcommittee on Oversight, and Investigations, Committee on Interstate and Foreign Commerce, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: I enjoyed our meeting on Tuesday and very much appreciated the opportunity to discuss with you your letter of May 17, 1976. I likewise appreciated your statesmanlike position on the subject of evaluations and information memoranda involved in rulemaking. You can be assured that all the regulatory decisions I make will be reached through an open and honest procedure, with all the relevant documents available afterwards to your committee.

Specifically with regard to Federal Motor Vehicle Safety Standard 208, I hope to receive written or oral (at my hearing of August 3) advice on the subject of occupant restraint systems from someone as knowledgeable as yourself before I issue a final rule in the matter.

With best regards.

Sincerely,

WILLIAM T. COLEMAN, Jr.

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS OF THE
COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE,
Washington, D.C., July 1, 1976.

Hon. WILLIAM T. COLEMAN, Jr.,
Secretary, Department of Transportation,
Washington, D.C.

DEAR MR. SECRETARY: I am pleased that I had an opportunity to meet with you and members of your staff on June 29. From my perspective, the meeting was a productive one.

I believe it may be useful to convey to you my sense of our discussion. Please let me know if your understanding of the meeting is at variance with mine.

We agreed that it was not necessary for you to send me copies of the memoranda described in my letter to you of May 17, 1976, at the time you receive them. You offered, however, to retain such memoranda and to make them available to me after you reach decisions with respect to the issues raised in memoranda you receive from the National Highway Traffic Safety Administration.

We also discussed whether the notice "Policies to Improve Analysis and Review of Regulations" published in the *Federal Register* of April 16, 1976 (pages 16200–16201) accurately reflects the "special flavor" of the legislative history of the National Traffic and Motor Vehicle Safety Act of 1966. You pointed out that this notice was drawn to apply to a number of your Department's operating arms, and might not take into account the specific intent of Congress regarding NHTSA, namely the express intent not to require benefit/cost analysis or cost/impact analysis as a necessary prerequisite to rulemaking under the 1966 Act. You agreed to reassess your notice in this regard, and to issue an appropriate refinement. I am enclosing several documents for your consideration on the question of benefit/cost analysis in the legislative history of the 1966 Act.

Please keep me informed with respect to your decision on refining the notice, and provide me with a copy of any amendment to the notice.

In closing I should note that the Subcommittee may, in specific instances in the future, find a need to ask the Department for relevant internal memoranda prior to the time that the Department reaches final decisions. We would expect the Department to respond to these requests on a case by case basis. Similarly, the Subcommittee will treat requests for confidentiality on a case by case basis.

Thank you for your concern in these important areas.

Sincerely,

JOHN E. MOSS,
Chairman, Oversight and Investigations Subcommittee.

Enclosures.

ATTACHED TO MOSS LETTER TO COLEMAN OF JULY 1, 1976

Footnote from: *Chrysler Corporation* v. *Department of Transportation*—Cite as 472 F 2d 659 (1972).

Chrysler Corporation, Petitioner, v. Department of Transportation et al., Respondents.

United States Court of Appeals, Sixth Circuit., Dec. 5, 1972.

16. The Automobile Manufacturers Association transmitted to the House Committee several amendments to HR 13228 (the House Bill) proposing a requirement that:

". . . the Secretary, in proposing and issuing orders establishing, amending, or withdrawing Federal motor vehicle safety standards under this section, shall be guided so far as practicable by the following criteria, and the Secretary shall include in each such order findings of fact with respect thereto:

* * * * *

"(2) The standard shall be consistent with the continuation or adoption by motor vehicle manufacturers of efficient designing, engineering, and manufacturing practices, and with innovation, progressiveness and customary model changes in the automotive industry.

"(3) The standard, the means of complying with the standard, and the methods of testing for compliance should embody feasible devices and techniques that are available or can be made available in a reasonable time *and at costs commensurate with the benefit to be achieved.* [Emphasis supplied.]

* * * * *

"(5) The standard should be made effective so as to allow adequate time for compliance, taking into account the time required for designing, engineering, tooling and production . . ."

Hearings before the Committee on Interstate and Foreign Commerce, U.S. House of Representatives, 89th Cong., 2d Sess., on H.R. 13228. "Part 2, Traffic Safety," p. 1203.

None of these specific restraints sought by the Automobile Manufacturers Association was adopted, and we must decline to write into the Act the very same suggestions which Congress declined to write into the Act.

REGULATORY REFORM—FEDERAL TRADE COMMISSION

MONDAY, MARCH 29, 1976

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS,
COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE.
Washington, D.C.

The committee met at 10 a.m., pursuant to notice, in room 2123, Rayburn House Office Building, Hon. John E. Moss, chairman, presiding.

Mr. Moss. The subcommittee will be in order.

Today's hearing is the fifth in the series of regulatory reform hearings which the Subcommittee on Oversight and Investigations has conducted in its study of nine regulatory agencies within its jurisdiction.

Previous hearings have considered the operations of the Consumer Product Safety Commission, the Interstate Commerce Commission, the National Highway Traffic Safety Administration, and the Food and Drug Administration.

Today's hearing will concern the Federal Trade Commission, the Federal Government's major agency for the protection of consumers from unfair and deceptive trade practices and one of two agencies charged with protecting competition.

The Federal Trade Commission was created by an act of Congress in 1914. Over the years, the Congress has clarified and modified the FTC's powers. In 1974, the Congress approved significant changes in the authority of Federal Trade Commission in the Magnuson-Moss Warranty—FTC Improvement Act.

The warranty title of this act gave the Commission the mandate to promulgate rules for adequate disclosure and enforcement of consumer product warranties. Under title II of the act, the FTC was given significant new authority to represent itself in court, to seek consumer redress and civil penalties for law violations and to distribute funds to outside groups in order to obtain greater public input. The act also clarified the FTC's authority to issue trade regulation rules.

During the 60 years of its existence, the FTC has been criticized for failing to enforce the law aggressively and for ignoring major antitrust and consumer problems. In 1969, a report by a Ralph Nader group said that "the Commission fails to enforce its laws properly in the context of its present powers."

A report by a Commission appointed by the American Bar Association in 1969 tended to reach the same conclusion. As a result

of major reorganizations in the early 1970's, the FTC has substantially improved its earlier record. I believe, however, that the job being done is not yet satisfactory.

The subcommittee's review of the Commission has indicated that problem areas remain and we intend to explore some of those today.

In the last several years, the FTC has issued complaints in several significant antitrust areas. One case involves a complaint against the four major makers of breakfast cereals. A second case is perhaps one of the largest antitrust cases ever brought—the complaint against eight of the largest oil companies—the so-called *Exxon* case.

I am concerned that these important cases, which raise vital antitrust issues, have not proceeded quickly enough, nor with adequate resources.

The cereal case, in which the complaint was issued on April 26, 1972, has not yet been brought to trial. Even more important, the *Exxon* case, in which the complaint was issued on July 18, 1973, has proceeded only through the first stage of the three necessary stages of pretrial discovery. The Commission has virtually no internal company documents relating to this investigation.

The Commission's trial staff has recently filed a 1,500-page motion for a subpena, which would require the submission of millions of documents by the oil companies. But, if the companies refuse to provide the documents without litigation, it could be several years until the Commission's staff may actually begin to review the substantive internal company papers.

We intend today to review the Commission's management of this case to determine what factors have caused it to proceed so slowly and whether or not those factors will continue to plague this litigation.

A second concern in the vital energy area is the Commission's handling of its investigation of the American Gas Association's reserve reporting system for natural gas. This investigation was initiated in October 1970, at the request of Senator Philip Hart.

After more than 4½ years of investigation, the Bureau of Competition recommended to the Commission on May 30, 1975, that a complaint be issued against the American Gas Association for "maintaining a deficient natural gas reporting program which influences the price" of gas.

The Commission did not issue the proposed complaint and returned the matter for further investigation on July 29, 1975. I am concerned by the length of the time that this important investigation has taken and the Commission's seeming inability to reach any decision on the preliminary issue relating to issuing a complaint.

I am further concerned by the Commission's failure to learn of a very relevant and material study conducted by the U.S. Geological Survey on gas reserves in offshore Louisiana. This study was commenced in 1972 and reviewed by the staff of this subcommittee in January of this year. The subcommittee learned that the USGS had estimated reserves of 37.4 percent higher than the American Gas Association had reported for offshore south Louisiana.

During the course of the Commission's consideration of the proposed complaint, the FTC's Bureau of Economics made extensive comments on the complaint, including comments on the legal sufficiency of the

evidence for which the economists apparently had no training or direct responsibility.

While advice to the Commission and the bureaus on economic matters should be the function of the Bureau of Economics, I do not believe that they should be trying the case, in effect, before the complaint is issued.

In the consumer protection area, the Federal Trade Commission was on January 4, 1975, given significant new authority by the Magnuson-Moss Warranty—FTC Improvement Act to bring consumer redress actions, to authorize money for better public representation in its proceedings and to bring civil penalty actions.

In addition, its authority to create substantive trade regulation rules has been clarified. But, there are indications that these new powers have not been used to their full potential. No consumer remedy or civil penalty actions have been brought in court.

With only 3 months left in this fiscal year, less than one-fifth of the public representation money authorized for this fiscal year has been spent. In many substantive areas, small cases continue to be brought instead of using a more cost-effective trade regulation approach. We will examine these issues carefully today.

On the other hand, we wish to commend the Commission for many of its actions in the interest of the American consumer. Major initiatives by the FTC in the health care area appear very promising.

In the face of continually rising automobile insurance costs, a complaint was issued last week against General Motors involving the distribution of "crash parts." In the product warranty area, the Commission has proceeded with vigor. The benefits in these and other areas will surely be felt by the public.

We are pleased to have Commissioners Paul Rand Dixon, M. Elizabeth Dole, and Stephen Nye with us here today, and we are especially pleased to have the Federal Trade Commission's newly appointed Chairman, Mr. Calvin J. Collier, formerly a General Counsel for the Commission and, I might add, the son of a former very distinguished member of the Committee on Interstate and Foreign Commerce, a man I had the pleasure of serving with during his tenure in the House.

We welcome you and your fellow Commissioners, and at this point I would ask that the members of the Commission and all staff members who might be called upon to give testimony stand and be sworn en bloc.

Do you swear to tell the truth, the whole truth, and nothing but the truth, so help you God?

Mr. DIXON. I do.

Mrs. DOLE. I do.

Mr. NYE. I do.

Mr. JOHNSON. I do.

Mr. SCHERER. I do.

Mr. GRADY. I do.

Mr. MCNAMAR. I do.

Mrs. BERNSTEIN. I do.

Mr. Moss. Please identify yourselves to the reporter for the record.

Mr. Chairman, before recognizing you for your statement, I would like to make a statement which I feel is most important in connection with the hearings about to commence.

During the course of this hearing, the members and staff of this subcommittee may be asking questions which relate to adjudicative matters where the Commission is the decisionmaker.

The chair wishes to state at this point that no question or statement asked by any member or staff person is intended to influence the Commission in any of its adjudicative decisions.

The subcommittee's questions will relate to the procedure, timetable, and management of such cases. To the extent that the subcommittee's Article I oversight responsibilities, related duties under the rules of the House of Representatives, and the Legislative Reorganization Act require such questions, we would like to assure the Commission that these questions or statements are not to be construed as expressing any opinion on the merits of a case, nor in any way suggesting how the Commission should discharge its sole responsibility of issuing a decision under the Federal Trade Commission Act and other statutes administered by the Commission.

The chair will be alert to any questions which would tend to transgress on the policy set forth in that statement.

We welcome you.

TESTIMONY OF HON. CALVIN J. COLLIER, CHAIRMAN, FEDERAL TRADE COMMISSION, ACCOMPANIED BY PAUL RAND DIXON, COMMISSIONER; STEPHEN NYE, COMMISSIONER; ELIZABETH HANFORD DOLE, COMMISSIONER; R. T. McNAMAR, EXECUTIVE DIRECTOR; OWEN M. JOHNSON, JR., DIRECTOR, BUREAU OF COMPETITION; FREDERICK M. SCHERER, DIRECTOR, BUREAU OF ECONOMICS; MARK F. GRADY, ACTING DIRECTOR, OFFICE OF POLICY PLANNING AND EVALUATION; JOAN Z. BERNSTEIN, ACTING DIRECTOR, BUREAU OF CONSUMER PROTECTION; AND ROBERT J. LEWIS, GENERAL COUNSEL

Mr. COLLIER. Mr. Chairman, and members of this subcommittee, the Federal Trade Commission welcomes this opportunity to present an overview of the Commission's programs, its present and projected allocation of resources, areas where the Commission is attempting to solve its own problems, and areas where legislative solutions may be necessary.

We appreciate your subcommittee's continuing interest in the Commission's efforts to accomplish its mission more effectively. As you know, Mr. Chairman, this is my third day on the job. Fortunately, I am surrounded by colleagues and senior staff whose knowledge will be as valuable to these hearings as I am sure they will be to me.

INTRODUCTION: OVERALL AGENCY MISSION

The Federal Trade Commission, of course, has responsibilities under a number of statutes, but it is fair to say that our activities are generally aimed at a common goal—helping the market work better to benefit the consuming public. The Commission is essentially a law enforcement agency. It doesn't regulate in the usual sense of that word. It sets no rates, routes or prices, confers no monopolistic grants

of authority and has no specific industry wards. Instead the Commission is a prosecutor and adjudicator charged with maintaining a free and fair marketplace throughout those areas of the economy not subject to Federal Government regulation.

When prices are forced upward by anticompetitive restraints, when the market is distorted by deception, when market forces are restrained by unnecessary Government interference, then the consumer pays more and receives less. The Commission's mission is to keep the market working right. Our mandate is based on the premise that the best allocator of economic resources is the free market.

Our law enforcement functions, of course, are derived principally from the broad language of section 5 of the Federal Trade Commission Act. As you know, section 5 reaches commercial activities which are unfair or deceptive, as well as unfair methods of competition. Additionally, of course, the Commission enforces the Clayton Act's prohibitions against unlawful corporate acquisitions, price discriminations, tie-ins, and interlocking directorates, as well as a host of specialized statutes.

In 1975, the Commission's responsibilities were considerably broadened by the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, which required the Commission to establish standards for written consumer warranties, and broadened and affirmed the Commission's authority to issue trade regulation rules, to institute consumer redress actions and to bring actions seeking civil penalties for violations of section 5. A list of the Commission's major statutory responsibilities is attached for the record as Appendix A to this statement [see p. 554].

Mr. Chairman, in the development of this testimony, we have tried to be responsive to the specific questions posed in your letter of invitation. We have responded to three of your particular requests in attachments to this testimony. We have responded to your request for the "outstanding success story" at the agency by attaching a list of 25 specific programs and cases—Appendix B—[see p. 557] which have benefited or will benefit the public. We have responded to your request for an "allocation of agency money and people by function" in Appendix C [see p. 563]. Appendix D [see p. 564] is an outline of the various sanctions available under the laws we enforce.

This statement will address, in order, the following general areas: Commission law enforcement activity; the impact of the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act of 1974; the Commission's efforts to reduce anticompetitive Government regulation; planning and management improvements at the Commission; recent actions to increase public awareness of and participation in Commission proceedings; and legislative proposals.

COMMISSION LAW ENFORCEMENT ACTIVITIES

Mr. Chairman, over the past several years the FTC has attempted to increase its antitrust activity without sacrificing its consumer protection mission. This effort, which is based on the belief that vigorous antitrust enforcement is the best consumer protection Government can offer, has been supported in the appropriations process by the President and the Congress.

In the antitrust area, the Commission has issued complaints against eight large oil companies and the major manufacturers of breakfast cereal. The *Exxon* case, as you know, is the largest and most complex ever initiated by the Commission; the pretrial discovery in the case is now well under way.

Other important antitrust activity over the past year includes the Xerox consent order, designed to lessen restraints in the office copier industry, and several cases which have struck down restrictive shopping center leases that allowed major tenants to block the entrance of discount competitors. Also just within the last few months, the Commission has issued decisions in major merger cases, including British Oxygen and Beatrice Foods, and has filed a complaint against the American Medical Association, alleging that the AMA's advertising restrictions constitute unlawful trade restraints.

The Hertz-Avis-National complaint has recently been withdrawn from adjudication for possible settlement.

Finally, just last week, the Commission issued a complaint against General Motors alleging monopolization of the distribution of automobile crash parts.

The Commission has tried to assign its antitrust enforcement priorities to areas of major consumer spending. Our energy program includes the congressionally-mandated energy study, covering all segments of energy production and distribution, as well as the *Exxon* case. The Commission is also investigating the state of competition in many stages of the food production, distribution, and retailing industries. In the health care area, the Commission is applying antitrust analysis not only to physician care, but also to drugs and hospital care.

We have also moved forward with the line of business reporting program, which we regard as one of our most important efforts. This vital program will eventually provide regularly published aggregate data which should be of significant assistance in formulating general economic policy, both public and private.

In the consumer protection area, the Commission is charged with eliminating unfair and deceptive practices. Recent efforts have included rules designed to protect consumers from mail order fraud and unlawful door-to-door sales, to preserve consumer defenses previously blocked by the holder-in-due-course doctrine and to require care labeling on wearing apparel.

The Commission has also attacked pyramid sale schemes, required health warnings in cigarette advertisements, ordered corrective advertising for deceptive cold treatment claims and obtained restitution for consumers victimized by fraudulent vocational school operations and land sale techniques.

Because enactment of the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act has had such a significant impact on the Commission's consumer protection activities, I will address these developments separately.

MAGNUSON-MOSS WARRANTY—FTC IMPROVEMENT ACT

In a little over a year since the enactment of the Magnuson-Moss Act, the Commission has completely reordered its consumer protection activities. By making consumer redress and civil penalties actions

directly available for violations of trade regulation rules, the act has prompted the Commission to shift substantial resources away from case-by-case adjudication and into rulemaking. The promulgation of trade regulation rules also enables the Commission to take a systematic approach to a broad spectrum of industrywide practices.

As mandated by Congress, the Commission has developed warranty rules designed to promote competition among warrantors and establish standards for the fair and nondeceptive use of warranties. Final rules have been promulgated covering warranty disclosures, presale availability of warranties and in formal dispute mechanisms.

Proposed trade regulation rules include food nutrition advertising, credit practices, the funeral industry, vocational schools, hearing aids, and used car sales. The Commission has also proposed trade regulation rules dealing with restrictions on price advertising of prescription drugs and prescription eyeglasses.

In addition, the Commission has initiated investigations into licensing requirements which may unfairly restrict consumer access to goods and services. In total, the Commission has 17 rules currently under consideration, and has encouraged the widest possible public participation in these proceedings. For the record, we have attached a table of the development of trade regulation rules and guides for the period 1970 through 1976—Appendix E [see p. 566].

Under the Magnuson-Moss Act, the Commission is empowered to sue for consumer redress—including rescission and reformation of contracts and damages—for unfair and deceptive practices. The Commission has already issued consent orders which should restore to consumers millions of dollars lost through allegedly unfair retention of retail credit balances, fraudulent land sales and deceptive vocational school operations. As these efforts are expanded, the Commission will be seeking consumer redress cases for other kinds of illegal practices.

In addition, the Commission has solicited public comment on a program to codify into trade regulation rules Commission law developed over 60 years and to rescind any rules or decisions that are outdated. Enforcement of the codified trade regulation rules through the civil penalty mechanism of the Magnuson-Moss Act should reduce delay in enforcement proceedings and lower enforcement costs. It should also assist business in complying with Commission law by eliminating any ambiguity resulting from the case-by-case approach.

Finally, the Magnuson-Moss Act has given the Commission new powers to seek civil penalties from persons who knowingly engage in conduct found to be deceptive or unfair in prior cease and desist or rulemaking proceedings. As part of a pilot project, the staff has sent letters to selected businesses, notifying them of their responsibilities in such settled areas of consumer protection law as bait and switch, unfair debt collection and deceptive endorsements. The Commission will take appropriate compliance action based on the results of this project.

ANTICOMPETITIVE GOVERNMENT REGULATION

It is certainly no secret that the American public has serious questions about the cost and utility of much Government activity. We think this is particularly true in the area of economic regulation. Accordingly, the Commission has urged a comprehensive reexamination

of economic regulation to determine whether intervention in some markets is, on balance, more harmful than helpful to the public.

Specifically, the Commission has begun to allocate resources to those areas, particularly in the service and professional trades, where Government interference with the marketplace may be increasing prices without providing significant benefits to consumers.

Last June, the Commission, noting that most States restrict prescription drug price disclosure by law or permit professional associations to impose such restrictions, announced a proposed rule which would allow advertising of price information for prescription drugs. It has been estimated that by stimulating price competition, this rule, if adopted, could result in annual savings to consumers of as much as $100 million.

Recently, the Commission has proposed a similar TRR which would permit advertisements dealing with the price and availability of prescription eyeglasses. By eliminating the restraints on advertising imposed by private, State, or local governmental action in all 50 States, it is estimated that this rule, if adopted, could affect substantial consumer savings in this $1.8 billion annual market.

The Commission has also authorized a staff investigation of entry barriers created by State licensing systems in the repair of radios, televisions, and other appliances. Its purpose is to determine to what extent licensing systems may restrain competition and increase consumer prices by imposing barriers to entry.

Similar industrywide investigations of realtors and veterinarians are underway. These inquiries will examine the disclosure or nondisclosure of information, restrictions on entry, and other areas of possible anticompetitive behavior.

The Commission has participated in various forums, including court and other agency proceedings, and offered its expertise in evaluating the anticompetitive aspects of Government regulation. The Commission has filed briefs in several civil lawsuits and in July of last year the Commission appeared in the U.S. Court of Appeals for the District of Columbia Circuit case raising questions about the FCC's decision to permit a joint venture by IBM and Comsat. The Commission has also filed comments with the CAB urging the Board to expand its test of the effect of deregulation in certain specified airline markets by permitting noncertificated carriers to enter the market.

The point of all these efforts is to free market forces where they are blocked by governmental or professional restraints. We believe that our activity in this area represents a unique effort by a Government agency to reduce restrictions on the free market system instead of adding ever-increasing layers of bureaucratic restraints.

PLANNING AND MANAGEMENT

Since the effectiveness of any enforcement activity is largely a product of good management, the Commission has been implementing a comprehensive system of improved policy planning, budgeting, and evaluation.

First: We have begun to apply cost-benefit analysis to agency decisionmaking. The Commission is developing a series of policy protocols

to be used in day-to-day cost-benefit decisions at the staff level, and has completed the protocols for use in false or unfair advertising cases and in bait and switch cases. Policy protocols in other areas of consumer protection and competition enforcement are being developed.

Second: By restructuring our activities and our budgeting process on a programmatic basis, we have provided a better foundation for planning and evaluation. We have introduced a formal, semiannual review of progress in each individual program so that changes in emphasis can be made as necessary to achieve greater public benefit.

Finally, the Commission is rapidly putting internal information systems in place. We anticipate that the litigation support services, the computerized case-project tracking system, and planned computerized filing systems will continue to give the Commission and its staff increased management support.

Both the programmatic budget and the Management Information System help us to identify problem areas and manage our inventory of investigations.

PUBLIC AWARENESS OF AND PARTICIPATION IN COMMISSION PROCEEDINGS

As you know, Mr. Chairman, the Commission has repeatedly demonstrated its commitment to Government which is open and accessible by going beyond minimum legal requirements. Our democratic system of Government assumes that the people have a right to know what their Government is doing for them, to them, and in their name. By increasing public participation and awareness, openness in Government can lead to improved decisionmaking, to greater accountability, and to a restoration of public confidence.

The Commission has taken the following steps to assure maximum public awareness and understanding of, and participation in, agency proceedings:

The Commission regularly announces the initiation of industrywide investigations and investigations of practices involving risks to public health or safety when those investigations are initiated. Other investigations are disclosed when a complaint is brought or an investigation is terminated.

The Commission has promulgated tough rules on ex parte communications and requires each staff member to keep logs of all outside contacts pertaining to pending investigations or cases. Each Commissioner also maintains a log.

The Commission has broadened its policy of disclosing individual Commissioner votes on a wide range of matters, including the issuance of complaints, the acceptance of consent agreements, the closing of investigations, as well as the issuance of final orders.

Recently the Commission voted to include in our public records all motions to quash compulsory process and Commission responses thereto and applications by former employees and Commissioners for clearance to appear before the Commission and Commission responses to those requests.

The Commission has gone beyond the requirements of the Freedom of Information Act by releasing most internal staff memorandums upon request after 3 years and virtually all after 10 years.

In addition to publicizing Commission advisory opinions, the Commission now is making available to the public all staff advisory opinions as well.

All meetings between the Commission and outside groups are open to the public unless the Commission votes to close the meeting because a statute, regulation, or the public interest requires its closing.

Thirty days' notice of such meetings is ordinarily given by publication in the Federal Register. This notice includes a brief description of the expected topic, identification of participants and, if the meeting is to be closed, the reason for closing.

The Commission provides the public with an opportunity to comment on all consent orders before they become final. In the *Xerox* case, over 50 public comments were filed, leading to a revision of the consent order.

Finally, the rules of practice adopted by the Commission implementing the rulemaking provisions of the Magnuson-Moss Act seek to encourage as much public participation as possible without unduly delaying the rulemaking proceedings.

Public participation is particularly important in rulemaking. As you know, the Commission is now authorized to provide compensation for reasonable attorney's fees and other costs of participating in rulemaking proceedings to persons who have an interest which would not otherwise be adequately represented and who are unable to afford the cost of participation. The Commission has implemented this provision by providing a new section in its rules of procedure which spells out in detail the procedures governing compensation for representation in rulemaking. To date, 10 such requests have been granted.

LEGISLATIVE PROPOSALS

In addition to urging a general reevaluation of the benefits and costs of governmental regulatory activity, the Commission is in the process of examining specific areas where reform might be desirable. The recent repeal of the so-called fair trade laws and an end to their brand of legalized price fixing is an example of the kind of congressional review which we strongly endorse.

Another antitrust exemption which should be reexamined is the broad exemption for agricultural cooperatives. On the basis of a report by its staff, the Commission has recommended that Congress consider a study evaluating the economic impact of the Federal marketing order system, and suggested a reexamination of the policy which permits large corporations to hold membership in agricultural cooperatives.

Legislative action is also needed to improve the Commission's ability to obtain information. Quite likely our greatest problem is delay. Of course, some delay is inevitable. A difficult antitrust case, such as American General Insurance, our oldest, may consume years. But, delay stemming from repetitive lawsuits challenging the Commission's authority to obtain information can—and should be—reduced.

Accordingly, we continue to urge enactment of legislation such as S. 642, which has passed the Senate, which would impose more effective penalties for failing to comply with the Commission's compulsory process. The penalties would apply to subpenas as well as special

orders. The legislation would also reaffirm in statutory terms the settled judicial doctrines limiting preenforcement lawsuits. This kind of statutory clarification should forestall insubstantial or duplicative challenges which now hamper our information gathering, without limiting a company's right to challenge the Commission's request in an enforcement action brought by the Commission.

Mr. Chairman, another area of concern is the increased use of the Freedom of Information Act by respondents and potential respondents. We have found, not surprisingly, that the members of the public most interested in Commission activity are the corporations challenged by the Commission and the law firms which represent them.

In this regard, the Commission notes that in the last year under the Freedom of Information Act, as amended, these corporations and law firms account for 67 percent of all initial requests and 63 percent of all appeals. By contrast, the media and public interest organizations made only 9 percent of all initial requests and a mere 5 percent of all appeals. These figures are shown in Appendix F. Processing these requests, which are sometimes enormous in scope, takes substantial time away from Commission personnel who would otherwise be prosecuting the investigation or case.

It may well be that this delay and frustration is the price that the public must pay for the many laudable benefits of the Freedom of Information Act. On the other hand, Congress may wish to investigate the potential misuse of the Freedom of Information Act to subvert the discovery process or to create needless delay.

In part because of our experience under the Freedom of Information Act, as amended, the Commission suggests that Congress may wish to move very deliberately in its consideration of the open meeting legislation presently pending before the House Judiciary Committee. Although the Commission strongly supports open Government, we are concerned that enactment of this legislation, as presently drafted, may provide more benefits to Commission respondents than to the public in general.

The Commission has recently expressed its concerns in testimony before the Subcommittee on Administrative Law and Governmental Relations of the House Judiciary Committee and would be pleased to submit that statement for the record.

Finally, the Commission wishes to draw the subcommittee's attention to legislation pending before the Congress which would permit either House of Congress to veto, by resolution, agency rulemaking. Although the FTC certainly does not question the power of Congress to reverse decisions made by the agencies it created, the Commission doubts whether this particular legislation is necessary or desirable with respect to Commission rulemaking, especially in light of the many procedural safeguards which have been implemented pursuant to the Magnuson-Moss Act. Again, the Commission has presented testimony on this proposed legislation and would be happy to make our statement available to the subcommittee.

CONCLUSION

Mr. Chairman, we appreciate your continued interest in the Federal Trade Commission and will continue to rely upon you and your sub-

committee for assistance and constructive criticism with the hope that the Commission will continue during the forthcoming year the progress which has already been made in maximizing its contributions to the public interest.

The past few years have been especially eventful for the Commission, and we anticipate an equally full agenda for the future.

Thank you, Mr. Chairman.

[Testimony resumes on p. 568.]

[The appendixes referred to follow:]

Appendix A

Statutes and Executive Orders Administered by the Federal Trade Commission

The Commission exercises enforcement and administrative authority under the Federal Trade Commission Act (38 Stat. 717, as amended; 15 U.S.C. 41–58), the Clayton Act (38 Stat. 730, as amended; 15 U.S.C. 12–27), the Export Trade Act (40 Stat. 516, as amended; 15 U.S.C. 61–65), the Packers and Stockyards Act (42 Stat. 159, as amended; 7 U.S.C. 181–229), the Wool Products Labeling Act (54 Stat. 1128, as amended; 15 U.S.C. 68–68j), the Trade-Mark Act (60 Stat. 427, as amended; 15 U.S.C. 1051–72), the Fur Products Labeling Act (65 Stat. 175, as amended; 15 U.S.C. 69–69j), the Textile Fiber Products Identification Act (72 Stat. 1717, as amended; 15 U.S.C. 70–70k), the Federal Cigarette Labeling and Advertising Act (79 Stat. 282, as amended; 15 U.S.C. 1331–39), the Fair Packaging and Labeling Act (80 Stat. 1296; 15 U.S.C. 1451–61), the Truth in Lending Act (82 Stat. 146, as amended; 15 U.S.C. §1601 *et seq.*), the Fair Credit Reporting Act (84 Stat. 1128; 15 U.S.C. §1681 *et seq.*), the Hobby Protection Act (87 Stat. 687, 15 U.S.C. § 2101 *et seq.*), the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act (88 Stat. 2183), and other Federal statutes.

THE FEDERAL TRADE COMMISSION ACT

Under this Act, the Commission is charged with the prevention of unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

CLAYTON ACT

Under Sections 3, 7 and 8 of this Act the Commission is charged with the duty of preventing and eliminating unlawful tying contracts, corporate mergers and acquisitions and interlocking directorates. Under the Clayton Act, as amended by the Robinson-Patman Act, the Commission is charged with the prevention of certain specified practices, i.e., unlawful price and related discriminations.

AMENDMENT TO PACKERS AND STOCKYARDS ACT

The provisions of this amendment extended the Commission's jurisdiction to cover certain matters previously subject to the exclusive jurisdiction of the Secretary of Agriculture. The amendment, in effect, grants the Commission jurisdiction over the activities of packers not related to livestock, meats, meat products, and the like. The Commission is granted additional power and jurisdiction over all transactions in commerce in margarine and oleomargarine and over retail sales of meat and related products. Other matters involving meat and related products are made subject to the Commission's jurisdiction where the Secretary requests the Commission to investigate and report or where, under certain circumstances, action by the Commission is necessary to exercise effectively its power or jurisdiction with respect to retail sales of meat and related products.

EXPORT TRADE ACT

The Commission is responsible for receiving and filing articles of association or incorporation of "associations" organized under the Export Trade Act; investigating their operations which may adversely affect competition with the United States; making recommendations to the associations for readjustments deemed necessary therein; and, where considered appropriate, making recommendations to the Attorney General for penal action.

WOOL PRODUCTS LABELING ACT

Under this statute the manufacture for introduction into commerce, or the introduction, sale, transportation or distribution, in commerce, or the importation into the United States of misbranded wool products, is unlawful, and constitutes an unfair method of competition and an unfair and deceptive act and practice under the Federal Trade Commission Act. The Commission is authorized to make inspections, analyses, tests and examinations of all wool products subject to the Act and to make such rules and regulations as may be necessary and proper for the administration and enforcement of the Act. In addition, the Commission is also empowered under the statute to prevent the movement of misbranded wool products in commerce by injunction and to proceed by libel action in certain cases for condemnation of such products.

LANHAM TRADE-MARK ACT OF 1946

Under this statute it is the duty of the Commission to make applications for the cancellation of registered trade-marks under certain specified conditions. The Commission, as applicant, must secure the proper evidence on which the application for cancellation is based, prepare the application, stating the grounds relied upon, be represented at the hearing before a Patent Office examiner for the purpose of presenting such evidence and otherwise prosecute the matter to a conclusion.

FUR PRODUCTS LABELING ACT

The Commission is charged with the administration and enforcement of this legislation which requires the labeling of fur articles of wearing apparel, as well as truthful invoicing and advertising of furs and fur products to show, among other things, the true English name of the animal from which the fur was taken and whether the fur is dyed or used. The Commission is also charged with issuing a Fur Product Name Guide and is authorized and directed to cause compliance inspections, analyses, tests and examinations to be made of furs and fur products subject to the Act and to prescribe rules and regulations governing the manner and form of disclosing required information under the Act. In addition to administrative enforcement, injunctive and condemnation proceedings are also provided for.

TEXTILE FIBER PRODUCTS IDENTIFICATION ACT

This additional "truth-in-fabrics" legislation became effective March 3, 1960, and covers the broad field of mandatory content disclosure in labeling, invoicing and advertising of textile fiber products. Under its terms, misbranding as well as false and deceptive invoicing and advertising of textile fiber products is unlawful. The Commission is authorized, under the Act, to make inspections, analyses, tests, and examinations of all textile fiber products subject to the statute, and further, to make such rules and regulations as may be necessary and proper for administration and enforcement of the Act. In addition, the Commission is directed to establish generic names for those man-made fibers which have not as yet attained one. Its enforcement is to be carried out through administrative procedures provided for under the Federal Trade Commission Act, together with injunction and criminal proceedings in the U.S. District Courts.

FEDERAL CIGARETTE LABELING AND ADVERTISING ACT OF 1966

This Act became effective on January 1, 1966, and was amended by the Public Health Cigarette Smoking Act of 1969, which took effect on January 1, 1970. Both Acts require the Commission to submit annual reports to the Congress concerning (a) the effectiveness of cigarette labeling, (b) current practices and methods of cigarette advertising and promotion, and (c) recommendations for legislation. The 1969 Act provided that cigarette packages manufactured, imported or packaged, must bear the statement, "Warning: The Surgeon General Has Determined that Cigarette Smoking is Dangerous to Your Health."

FAIR PACKAGING AND LABELING ACT

This Act requires the Commission to issue regulations having the force of law respecting net contents disclosures, identity of commodity, and name and place of business of manufacturer, packer or distributor; and the Act authorizes

additional regulations when necessary to prevent consumer deception or facilitate value comparisons in respect to declaration of ingredients, slack fill of packages, use of "cents-off" or lower price labeling, and characterization of package sizes. The Act became effective July 1, 1967, and gives the Commission responsibility for consumer commodities other than food, drugs, therapeutic devices and cosmetics. Violations of regulations issued under the Act are treated as violations of Section 5 of the Federal Trade Commission Act.

TRUTH IN LENDING ACT

This Act (Title I of the Consumer Credit Protection Act) delegates to the Commission, effective July 1, 1969, general enforcement responsibility as to consumer credit disclosures. The Act requires all consumer creditors to make detailed written disclosures concerning all charges and related aspects of the transaction, including disclosure of finance charges expressed as a simple annual percentage rate, before consummation of the sale or loan, and before the account is opened and on every periodic statement in the case of open-end or revolving creditors. The Act also contains specified requirements for any advertisement containing a credit representation, and it includes a three-day right of rescission in any transaction involving a security interest (except first mortgage) in the consumer's residence. The Truth in Lending Act was amended on October 26, 1970, to prohibit the issuance of unsolicited credit cards. The Act was further amended by the Fair Credit Billing Act, effective October 28, 1975, which provides for prompt written acknowledgement of consumer billing complaints and reinvestigation of billing errors by creditors sending periodic billing statements. The amendment prohibits such creditors from taking action which adversely affects the consumer's credit standing until the reinvestigation is made, prohibits creditors from reporting to third parties that disputed amounts are past due until the reinvestigation has been completed and requires that reports to third parties indicate that the amount is disputed when that is the case. The Fair Credit Billing Act further requires the creditor to mail periodic statements at least 14 days before the due date, to promptly post payments to the debtor's account, and refund overpayments or credit them to the debtor's account. Finally, the Act requires sellers to promptly notify credit card issuers of the return of goods or services purchased on such accounts and limits the application of the holder-in-due-course doctrine in credit card transactions. The Truth in Lending Act provides that a violation of the Act or any implementing regulation shall be deemed a violation of the Federal Trade Commission Act, irrespective of whether the violator is engaged in commerce or meets any other jurisdictional test in the Federal Trade Commission Act.

FAIR CREDIT REPORTING ACT

The Fair Credit Reporting Act, effective April 25, 1971, is designed to ensure that consumer reporting companies such as credit bureaus exercise their responsibilities in providing information to credit grantors, insurers, employers and others in a manner that is fair and equitable to the consumer, with regard to confidentiality, accuracy, and the proper use of such information. Users of such information must inform the consumer when adverse action (such as denial of credit, insurance or employment) is taken on the basis of such reports, and the user must identify the company which is the source of the report so that its accuracy and completeness can be vertified by the consumer.

THE HOBBY PROTECTION ACT

This Act became effective on November 29, 1973, and makes unlawful the manufacture or importation of imitation numismatic and political items unless marked in accordance with regulations prescribed by the Federal Trade Commission. Imitation numismatic items must be inscribed with the word "COPY" and imitation political items must carry the calendar year of manufacture.

THE EQUAL CREDIT OPPORTUNITY ACT

This Act (Title VII of the Consumer Credit Protection Act) became effective on October 28, 1975 and provides that it shall be unlawful for any creditor to discriminate against any applicant on the basis of sex or marital status. Under this statute, any violation of the Act or its implementing regulation shall be

deemed a violation of the Federal Trade Commission Act, irrespective of whether the violator is engaged in commerce or meets any other jurisdictional test in the Federal Trade Commission Act.

THE MAGNUSON-MOSS WARRANTY—FEDERAL TRADE COMMISSION IMPROVEMENT ACT

Title I of this Act of 1975 authorizes the Federal Trade Commission to develop regulations for written and implied warranties. The Act authorizes the Commission to establish disclosure and designation standards for written warranties; defines the Federal content standards for full warranties; and establishes consumer remedies for breach of warranty or service contract obligations.

Title II of the Act amends the Federal Trade Commission Act to enlarge the Commission's jurisdiction to cover activities "affecting commerce" as well as "in commerce"; to authorize the Commission to prescribe substantive rules covering unfair or deceptive acts or practices; to increase the Commission's authority to represent itself in civil court actions and before the Supreme Court under certain conditions; to authorize the Commission to commence a civil action to recover civil penalties for knowing violations of the FTC Act; and to authorize the FTC under certain conditions to file suit for consumer redress of injuries.

THE EMERGENCY PETROLEUM ALLOCATION ACT

It requires the Commission and the Attorney General to report on the competitive effects of any mandatory allocation regulation involving crude oil, residual fuel oil, and each refined petroleum product.

THE FEDERAL ENERGY ADMINISTRATION ACT

It directs the Commission to cooperate with the Federal Energy Administration to develop data on oil and gas reserves.

THE ENERGY, POLICY AND CONSERVATION ACT

It charges both the Commission and the Attorney General with responsibility to monitor the competitive effects of statutory antitrust exemptions granted pursuant to the International Energy Program. The Deep Water Port Act of 1974 requires the Commission and the Attorney General to submit a report on the competitive effects of the issuance by the Secretary of Transportation of a license for a deep water port.

EXECUTIVE ORDERS

Besides numerous Executive Orders which apply to all Federal agencies, the following apply expressly to the Federal Trade Commission: (1) E.O. 9809—transferring to the Federal Trade Commission the responsibility to compile financial statistics on American industry; (2) E.O. 9833, 10090, 10980—permitting the Federal Trade Commission to inspect corporate income tax returns; (3) E.O. 10033—requiring the Federal Trade Commission and other Federal agencies to furnish statistics for use by international bodies of which the USA is a member; (4) E.O. 10480—implementing the Defense Production Act of 1950; (5) Reorganization Plan No. 8 of May 15, 1950 transferring to the Chairman certain executive and administrative functions of the Commission; and (6) Reorganization Plan No. 4 of 1961 authorizing the Commission to delegate its functions to subordinates.

Appendix B

List of Specific Programs and Cases in Response to Request for "Outstanding Success Story"

LINE OF BUSINESS REPORTING PROGRAM

The loss of considerable important business information on corporate performance as a result of the merger movement in the last twenty years led the Commission to initiate the line of business program to provide additional statistical insight into the American economy. Under the program, large manufacturing companies are required to report certain financial data, such as costs, sales and

profits, broken down according to individual product lines. The availability of this information in aggregate form will allow the Commission to allocate its law enforcement resources more efficiently, with resulting benefits to the consumer. In addition, the increased availability of such economic data on industrial performance in specific lines of business will allow free market forces to operate more effectively.

PRESCRIPTION DRUG AND PRESCRIPTION EYEGLASSES PRICE DISCLOSURES

The Commission has proposed a trade regulation rule designed to permit disclosure of price information for prescription drugs. Since prescription drug prices appear to vary widely, restrictions on the dissemination of price information may prevent consumers from realizing substantial cost savings and may inhibit price competition among pharmacists. Since most states currently restrict price disclosure by law or permit professional associations to impose such restrictions, the Commission's proposed rule is an example of government action that is designed to promote rather than to subvert natural market forces. The Commission has proposed a similar rule designed to permit the dissemination of accurate information regarding the price and availability of prescription eyeglasses.

OCCUPATIONAL LICENSURE PROGRAM

The Commission is presently examining the effects of legal and guild-like restrictions enforced at the state and local level by trade associations and state boards. State and local restrictions may raise prices by restricting the flow of information to consumers and the supply of resources devoted to particular industries. A recent staff study indicated that TV repair prices were higher and service quality no better in a state that "regulated" TV repairmen. The Commission has authorized an industrywide investigation of state licensing systems for the repair of radios, televisions or other appliances. The Commission has also authorized an industrywide investigation of licensing requirements for veterinarians. And, the Commission and its staff have filed amicus curiae briefs in various litigation concerning the validity of similar restrictive requirements.

ENERGY PROGRAM

In the largest and most complex litigation it has undertaken, the Commission issued a complaint against eight large petroleum manufacturers alleging monopolization and conspiracy to monopolize. The Commission is also conducting a Congressionally mandated energy study for the purpose of reporting on the structure, practices and performance of the significant energy industries including an assessment of the impact of government regulation on energy exploration, production and utilization.

AMERICAN MEDICAL ASSOCIATION COMPLAINT

The American Medical Association has been charged by the FTC with imposing restraints on advertising which restrict the flow of information to consumers.

OPPOSITION TO PROPOSED MERGER IN THE ENERGY INDUSTRY

The Commission's prompt action in inquiring into a proposed merger between the Standard Oil Company of Indiana and Occidental Petroleum has been given credit as a major influence in the decision of those corporations to abandon the plan. The Commission, by acting quickly and investing a minimal amount of resources, may have accomplished something having a significant impact on both competition and consumers, which could have taken untold years and resources to accomplish through litigation.

BREAD AND TETRACYCLINE CASES

It has been documented in at least two of the Commission's litigated cases resulting in final orders that substantial savings to consumers have come about. In 1967, a Commission cease and desist order became final in the matter of *Bakers of Washington, Inc., et al.*, Docket No. 8309. This order ended a conspiracy which artificially raised bread prices in Washington and surrounding states. The order brought about greatly reduced bread prices which have resulted in an

estimated saving of $3.5 million per year to consumers in all income brackets. In the matter of *American Cyanamide Co. et al.*, Docket No. 7211, the Commission issued an order which required the non-discriminatory, nonexclusive licensing of patents for the manufacture of tetracycline, an antibiotic drug, and the independent determination of prices charged for the drug by pharmaceutical companies. Since the order became effective, the price paid for tetracycline has continually declined with enormous savings to consumers.

XEROX CONSENT ORDER

The Commission has entered a cease and desist order against Xerox Corporation in Docket No. 8909. This order lessens patent restraints and thus should increase competition in the office copier industry and should ultimately benefit the consumer.

PROCTER AND GAMBLE DIVESTITURE ORDER

In 1967, the Supreme Court upheld an order by which the FTC required Procter and Gamble, Inc. to divest itself of the Clorox Chemical Co. The case involved a product-extension merger, and the Court upheld the Commission's finding that the acquisition of Clorox by Procter and Gamble eliminated Procter and Gamble as a potential competitor in the liquid bleach industry. This is an illustrative case in which the Commission has acted to preserve competition in the manufacture of a consumer product.

PROHIBITION OF RESTRICTIVE SHOPPING CENTER LEASES

In the matter of *Tysons Corner Regional Shopping Center et al.*, Docket No. 8886, the Commission struck down lease agreements which prevented the entrance of discount stores into a major shopping plaza. By eliminating the restriction, the Commission set a new precedent which should increase the purchasing alternatives of consumers throughout the country who depend on large shopping centers to provide them with the facilities to satisfy their purchasing needs.

DISCLOSURE OF HEALTH HAZARDS OF SMOKING

The Commission has played a significant role in securing disclosure of the health hazards of smoking. In 1964, it promulgated a trade regulation rule requiring health warnings in cigarette labeling and advertising but postponed the rule's effectiveness until Congress could act. Congress required a health warning on cigarette packages in 1965, and imposed a moratorium on FTC action in the area. In 1969, when the moratorium expired, the Commission again commenced a rulemaking proceeding which was halted when Congress strengthened the package warning, banned cigarette advertising from the broadcast media, and prohibited FTC action on warnings in advertising for an additional two years. In 1972, the Commission entered consent orders against the major domestic cigarette companies requiring disclosure of the health warning in advertising and, in 1975, sued six cigarette companies for civil penalties for their alleged failure to comply with these orders. The Commission also secured voluntary agreements from the cigarette companies to disclose the FTC's measurements of tar and nicotine levels.

FLAMMABLE PLASTICS DISCLOSURES

In *Society of the Plastics Industry, Inc., et al.*, Docket No. C–2596, the Commission obtained consent agreements requiring manufacturers of cellular plastics used in building construction to alert users to the fact that those materials, advertised as "non-burning" and "self-extinguishing," burn intensively and release dense clouds of smoke when ignited. Under the agreements, the respondents are also required to establish a $5 million research project to explore the flammability problems of cellular plastics. These actions could save countless lives and property that might otherwise have been lost as a result of the fire hazard posed by this material.

HOLDER-IN-DUE-COURSE TRADE REGULATION RULE

The Commission has promulgated a trade regulation rule entitled "Preservation of Consumers' Claims and Defenses," which restricts the application of the

centuries old holder-in-due course doctrine. Without such a rule, a consumer is required to continue installment payments to a creditor, such as a bank, which has obtained the installment contract, even if the consumer has a valid defense against the original seller of the goods. The buyer's only recourse under those circumstances was to sue the original seller—an undertaking so burdensome and expensive that most consumers even with completely valid claims chose to forego their rights. The rule, which becomes effective in May 1976, requires that consumer credit contracts include a provision preserving the consumers' right to dispute the obligation to pay if the goods are defective.

TRADE REGULATION RULES FOR MAIL ORDER SALES, DOOR-TO-DOOR SALES AND ADVERTISED SPECIALS OF RETAIL FOOD STORES

An FTC trade regulation rule titled "Mail Order Merchandise" became effective in February 1976. It requires that mail order sellers either provide a reasonable estimate of the length of time within which merchandise will be shipped, or ship the merchandise within 30 days after receipt of a properly completed order from the consumer. If the shipment will be delayed, consumers must be offered the opportunity to cancel their orders or to receive a refund. This rule remedies one of the most common sources of complaints made by consumers to the Commission. In 1974, the Commission issued a trade regulation rule establishing a "cooling-off period for door-to-door sales." This rule provides customers of door-to-door sellers with a three day cooling-off period in which to cancel contracts, thus neutralizing the high pressure sales techniques frequently associated with door-to-door selling. Under the 1971 trade regulation rule on "Retail Food Stores Advertising and Marketing Practices," food stores are prohibited from failing to have advertised specials available at the advertised prices. Food is, of course, an important item in every consumer's budget, and this rule helps protect consumers who patronize a store because of advertised specials, only to discover that the advertised item is either unavailable or marked at a price higher than the advertised price.

MULTI-LEVEL MARKETING SCHEME ORDERS

The Commission has in the past two years taken action in the burgeoning field of multi-level marketing schemes, also referred to as pyramid distribution. In cases such as *Holiday Magic, Inc.*, Docket No. 8834, *Ger-Ro-Mar, Inc.*, Docket No. 8872, and *Koscot Interplanetary*, Docket No. 8888, the FTC has prohibited the practice of luring consumers to invest substantial sums of money in marketing programs through express or implied representations that the original investment and large profits can be quickly earned by the recruitment of others to make similar investments. Small investors are the usual target in multi-level marketing schemes, and the loss to individual consumers victimized by such schemes frequently involves substantial amounts of money. The consumer benefit from curtailing such schemes will be significant.

CONSUMER REDRESS

The Commission has obtained redress, in money or in kind, for consumers injured by unfair or deceptive practices. Consumer redress consent orders have been obtained against private sellers of vocational training whose graduates were unable to find jobs. The Commission ordered tuition refunds to those graduates. (*Lear Siegler, Inc.*, Docket No. 8953, *Fuqua Industries, Inc.*, Docket No. C–2626.) Other restitution cases have involved retail merchants who had cancelled customers' credit balances, and sellers of undeveloped land. Additional cases are pending which may provide a basis for seeking court ordered redress pursuant to the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act of 1974.

CORRECTIVE ADVERTISING

In the matter of *Warner-Lambert Co.*, Docket No. 8891, the Commission issued a corrective advertising order. Corrective advertising is an innovative remedy that the Commission has developed for deceptive advertising, and it has also been used in consent orders. *E.g., ITT Continental Baking Co.*, Docket No. C–2015; *Pay Less Drug Stores Northwest, Inc.*, Docket No. C–2406; *Boise Tire Co.*, Docket No. C–2425. Recently the Commission approved a variant on the corrective advertising remedy, when it accepted a consent agreement from Firestone

Tire & Rubber Co. under which Firestone agreed to spend $750,000 to sponsor tire safety advertising. Such remedies are intended to remove the effects of the prior deceptive advertising and, by defining the advertisers' obligation and raising the stakes of unfair or deceptive advertising, should compel advertisers to police their own practices and make more restrained and responsible claims.

ADVERTISING SUBSTANTIATION

After the illegality of unsubstantiated advertising claims was established in 1972 in *Pfizer, Inc.*, Docket No. 8819, and *Firestone Tire & Rubber Co.*, Docket No. 8818, the Commission developed the advertising substantiation program to insure that advertisers possess a reasonable basis for their representations and rely on that reasonable basis when representations are made. Since 1972, the Commission has regularly required various consumer goods industries to supply adequate substantiation for their advertising representation. For example, substantiation has been required for air conditioners, hearing aids, tires, soaps and detergents, and cough and cold remedies. The substantiation program aids consumers by deterring companies from making unsubstantiated claims and by alerting the Commission to situations in which enforcement action may be appropriate.

PILOT PROJECT FOR CIVIL PENALTIES ENFORCEMENT

The Commission has initiated a pilot program to implement its authority to seek civil penalties from anyone who engages in conduct the Commission has found to be unlawful in prior cease and desist proceedings. This authority was mandated by Section 205 of the Magnuson-Moss Warranty—FTC Improvement Act, which became law on January 4, 1975. The pilot program focuses on some of the most common and well established unfair and deceptive practices. Under the program, letters have been sent to selected business firms notifying them of the potential penalty of $10,000 per violation for engaging in acts or practices as defined in a synopsis of relevant FTC decisions accompanying each letter. The staff will follow up by investigating whether the recipients of the letter subsequently engage in such practices.

INJUNCTIONS

The Commission has exercised its new authority under the Trans-Alaska Pipeline Authorization Act to bring suit in a federal district court to enjoin imminent or actual violations of the laws the Commission enforces, when an injunction would be in the interest of the public. This preventive authority enables the Commission to arrest particularly aggravated abuses in their incipiency, to avoid the aggregation of serious public harm during the period required for the Commission to complete cease and desist order proceedings and attendant appeals, and to preserve the status quo in order to preserve effective relief. In its first exercise of this new authority, the Commission sought and obtained an order restraining Travel King, Inc. and other travel agencies promoting psychic surgery tours to the Philippines from making certain representations and using certain photographs and films that imply that so-called "psychic surgery" is actual surgery in which the body is entered or tissue is removed. The Commission subsequently conducted an administrative proceeding that resulted in a final order to cease and desist the same practices.

THE UNFAIRNESS DOCTRINE

Subsequent to the decision in *FTC* v. *Sperry and Hutchinson Co.*, 405 U.S. 233 (1972), in which the Court recognized the Commission's broad power to define and proscribe unfair practices, the Commission has made significant use of the unfairness doctrine. An important example is the proposed trade regulation rule on creditors' remedies which defines a number of unfair credit practices. The Commission also relied on the unfairness doctrine in the matter of *Beneficial Corp.*, Docket No. 8922, involving practices stemming from the advertising and operation of an income tax service.

TRADE REGULATION RULE PROGRAM

The Commission has increasingly directed its consumer protection resources toward the promulgation of industrywide trade regulation rules as an alternative

to case-by-case law enforcement. Broadly applicable rules are frequently more effective than individual cases in that they eliminate the necessity to sue individual companies one after the other, and rules can be fairer than cases by holding all industry members to the same standard of conduct rather than singling out a few businesses for strict order requirements. The Commission's rulemaking efforts received additional impetus from the Magnuson-Moss Act, which made companies liable both for civil penalties and consumer redress if they violate a trade regulation rule. The Commission is presently engaged in rulemaking proceedings on vocational schools, food advertising, the funeral industry, credit practices, used cars, advertising of over-the-counter drugs, franchising, hearing aids, protein supplements, flammability hazards of plastics, mobile homes, and health spas, as well as price disclosures for prescription drugs and eyeglasses.

INCREASED EMPHASIS ON ANTITRUST ENFORCEMENT

During the last several years, the Federal Trade Commission has increasingly emphasized the role of competition in the free market. This increased emphasis reflects the Commission's belief that restraints upon competition deprive the public of access to goods and services of optimum quality at minimum prices and that the free market system is the best guarantor of consumer benefit. This increased commitment of resources to maintaining competition has been accomplished without any diminution in the resources committed by the Commission to its direct consumer protection activities.

EXAMINATION OF ANTICOMPETITIVE GOVERNMENTAL RESTRAINTS

The Commission has begun to examine potentially anticompetitive government regulations and has participated in a number of proceedings by commenting on the impact of proposed regulatory action. In 1975, the Commission opposed before the FCC a proposed joint venture in the communications satellite field by IBM and COMSAT, on the ground that the joint venture could have a substantial anticompetitive effect. The Commission has also intervened in an ICC proceeding investigating the use of freight cars for shipping grain. In 1975, the Commission filed comments with the CAB in two different matters. The Commission urged the Board to consider permitting non-certificated carriers to enter the market and applauded the CAB's decision to test the effects of deregulation but cautioned against limiting the experiment geographically. The Commission also urged the Board to adopt the no-frills fare as a means by which the airlines can satisfy the different wants of consumer groups without obliging any group to subsidize the other.

IMPROVEMENTS IN RESOURCE MANAGEMENT AND PROCEDURES

The Commission has taken steps to introduce cost/benefit analysis into its resource decisions and has embarked on a management improvement program designed to complement and support a program budget. The Commission has also embarked on a program to develop criteria that can be used to measure the public interest involved in each Commission enforcement proceeding. While the "public interest" cannot always be quantified numerically, it is possible to formulate a series of questions that will elicit the type of information relevant to making a policy, rather than a legal, decision. The first policy protocols, adopted by the Commission on December 19, 1975, should form the basis for staff enforcement recommendations in the area of false or unfair advertising. If used properly, policy protocols should be the basis for day-to-day application of cost/benefit analysis at the staff level. In all these ways, the Commission is developing a coordinated system of policy planning designed to produce the maximum benefits to consumers and competition from its available resources. In addition to strengthening its cost/benefit analysis, the Commission has made procedural changes designed to increase accountability and to reduce delay in Commission law enforcement processes. For example, it has eliminated a cumbersome delay-inviting procedure that had provided for an automatic 30-day negotiation period, often extended, prior to issuance of a final complaint.

Appendix C

Allocation of Agency Money and People, by Function

[Dollar amounts in thousands and fiscal years]

Function	Allocation of agency money			Allocation of agency people man-years		
	1975 actual	1976 estimate [1]	1977 estimate [1 2]	1975 actual	1976 estimate [2]	1977 estimate
Maintaining competition (foster and preserve competition and the free enterprise system)	$12,296	$17,672	$23,309	503	593	663
Consumer protection (elimination of unfair or deceptive practices, particularly those which inhibit or restrict the free exercise of informed choice)	16,980	19,061	18,635	729	705	672
Economic activities	3,003	4,074	4,197	145	151	145
Executive direction and policy planning	2,086	2,611	2,856	91	88	91
Administration and management	3,290	3,673	3,786	143	141	137
Total commission	37,655	47,092	52,833	1,611	1,678	1,708

[1] Fiscal year 1977 President's budget; includes cost of October 1975 pay raise, fiscal year 1976 supplemental request pending.

[2] Tentative allocation.

Appendix D

FEDERAL TRADE COMMISSION—CIVIL AND CRIMINAL SANCTIONS

Act	Section	Civil penalty	Criminal penalty
Federal Trade Commission Act, as amended, 15 U.S.C. 41 et seq.	Sec. 5(l), 15 U.S.C. 45.—Violation of final Commission orders	Not more than $10,000 for each violation	
	Sec. 5(m)(1)(A) as amended by/ sec. 205(a) of Public Law 93-637, 88 Stat. 2200 (1975).—Violation of Commission rule respecting unfair or deceptive acts or practices with actual knowledge or knowledge fairly implied.	do	
	Sec. 5(m)(1)(B) as amended by sec. 205(a) of Public Law 93-637, 88 Stat. 2200 (1975).—Violation of final Commission order to cease and desist from unfair or deceptive practice with actual knowledge	do	
	Sec. 10, 15 U.S.C. 50.—		
	Neglect or refusal to obey subpena or lawful requirement of the Commission.		Not less than $1,000 nor more than $5,000 or imprisonment for not more than 1 yr or both.
	Willful false entry in reports, records, etc., destruction of documents, refusal to submit documentary evidence for inspection.		Not less than $1,000 nor more than $5,000 or imprisonment for not more than 3 yr or both.
	Failure to file annual or special report within time fixed by Commission and failure continues for 30 days after notice of default.	$100 for each and every day of the continuance of such failure.	
	Publication of information obtained by Commission without authority.		Not more than $5,000 or imprisonment for not more than 1 yr or both.
	Sec. 14, 15 U.S.C. 54.—False advertisement for the purpose of inducing or likely to induce purchase of food, drug, device or cosmetic if use of such commodity is injurious to health or if commodity advertised with intent to defraud or mislead.		Not more than $5,000 or imprisonment for not more than 6 mo or both. Subsequent violations—Not more than $10,000 or imprisonment for not more than 1 yr or both.
Clayton Act, as amended, 15 U.S.C. 12 et seq.	15 U.S.C. 13a.—Knowledgeable discrimination against competitors with respect to discounts, rebates, etc.; sales at discriminatory or unreasonably low prices for purpose of destroying competition.		Not more than $5,000 or imprisonment for not more than 1 yr or both.
	Sec. 11(1), 15 U.S.C. 21.—Violation of final Commission orders	Not more than $5,000 for each violation	

Textile Fiber Products Identification Act, as amended, 15 U.S.C. 70.[1]	Sec. 11, 15 U.S.C. 70i.—Willful violation of the Act		Do.
Federal Cigarette Labeling and Advertising Act, as amended, 15 U.S.C. 1331 et seq.	Sec. 9, 15 U.S.C. 1338.—Violation of the provisions of the Act		Not more than $10,000.
Consumer Credit Protection Act, as amended, 15 U.S.C. 1601 et seq.: [1]			
Title I—Truth in Lending	Sec. 112, 15 U.S.C. 1611.—Willful and knowing failure to comply with the requirements of Title I.		Not more than $5,000 or imprisonment for not more than 1 yr or both.
	Sec. 134, 15 U.S.C. 1644.—Use of counterfeit, fictitious, altered, forged, lost, stolen or fraudulently obtained credit card.		Not more than $10,000 or imprisonment for not more than 5 yr or both.
Title VI—Fair Credit Reporting	Sec. 619, 15 U.S.C. 1681q.—Knowing and willful obtaining of information from a consumer reporting agency under false pretenses.		Not more than $5,000 or imprisonment for not more than 1 yr or both.
Export Trade Act, 15 U.S.C. 61 et seq.[1]	Sec. 5, 15 U.S.C. 65.—Failure of export trade associations to file with the Commission information required by the Act.	$100 for each and every day of the continuance of such failure.	
Wool Products Labeling Act of 1939,[1] 15 U.S.C. 68.	Sec. 6(b), 15 U.S.C. 68d.—Neglect or refusal to maintain and preserve proper records showing fiber content as required by the Act.	$100 for each day of such failure	
	Sec. 10, 15 U.S.C. 68h.—Willful violation of the Act		Do.
Fur Products Labeling Act, 15 U.S.C. 69 [1]	Sec. 3(e), 15 U.S.C. 69a.—Neglect or refusal to maintain and preserve proper records of label substitution as required by the Act.	$100 for each day of such failure	
	Sec. 8(d), 15 U.S.C. 69f.—Neglect or refusal to maintain and preserve proper records showing information required by the Act.	do	
	Sec. 11, 15 U.S.C. 69i.—Willful violation of the Act		Do.
	Sec. 620, 15 U.S.C. 1681r.—Knowing and willful disclosure of information concerning an individual to unauthorized person.		Do.
Fair Packaging and Labeling Act, as amended, 15 U.S.C. 1451 et seq.[1]			
Hobby Protection Act, 15 U.S.C. 2101 et seq.[1]			
Emergency Petroleum Allocation Act of 1973, as amended, 15 U.S.C. 751 et seq.[2]			

[1] Subject to penalties provided in the Federal Trade Commission Act (15 U.S.C. 41 et seq.) as though its applicable terms and provisions were incorporated into and made a part of the Act.

[2] Subject to penalties provided in sec. 10 of the Federal Trade Commission Act, 15 U.S.C. 50.

Appendix E

PROGRESS OF FEDERAL TRADE COMMISSION RULES AND GUIDES: 1970 - 1976

INVESTIGATION (ANNOUNCEMENT OF TRADE)	ACTION PROPOSED	MAJOR EVENTS (PAST AND PROJECTED)	HEARINGS (PAST AND PROJECTED)	FINAL ACTION	REMARKS
Pornadas	January 24, 1968 TRR	Notice of REVISED PROPOSED TRR February 5, 1969 2nd Notice of REVISED PROPOSED TRR August 11, 1970	April 9, 1969 (Washington, D.C.)		3 administrative cases fortnight, 2 settled, 1 went into litigation; all now settled.
Decorative Wall Paneling Industry	February 20, 1968 GUIDE	Comment period closed April 22, 1968 Notice of REVISED PROPOSED GUIDE May 28, 1969 Comment period closed June 27, 1969	August 12, 1970 (Washington, D.C.)	FINAL GUIDE promulgated December 14, 1971	
Use of the Word "Pure"	March 20, 1968 GUIDE	Comment period closed May 10, 1968	(not required to be held)	FINAL GUIDE promulgated November 16, 1971	
Monolithic Furniture Industry	April 24, 1968 GUIDE	Notice of REVISED PROPOSED GUIDE February 13, 1970 Notice of REVISED PROPOSED GUIDE August 14, 1970 Comment period closed December 28, 1970	November 2-3, 1970 (Washington, D.C.)	FINAL GUIDE promulgated December 21, 1972	
Light Bulb Industry	July 30, 1968 TRR	Comment period closed November 1969	September 30, 1969 (Washington, D.C.)	FINAL TRR promulgated July 23, 1970	
Deposit Receivers	July 30, 1969 TRR August 18, 1971 REVISED TRR	Comment period closed October 7, 1969 Public record reopened April 17, 1971 Comment period closed June 16, 1971 Comment period closed on revised TRR September 21, 1971	October 14-16, 1969 (Washington, D.C.)	FINAL TRR promulgated January 12, 1971 REVISED FINAL TRR promulgated December 14, 1971	
Leather and Simulated Leather Industry	August 11, 1969 GUIDE	Comment period closed November 14, 1970	April 7, 1970 (Washington, D.C.)	FINAL GUIDE promulgated September 22, 1970	Guide revised September 9, 1971
Wool and Fur Prices Acts and Labeling	October 14, 1969 GUIDE	Comment period extended to January 31, 1970 (industry request)	(not required to be held)	FINAL GUIDE promulgated August 8, 1970	
Care Labeling	November 6, 1969 TRR	Comment period closed July 1, 1970	January 12-14, 1970 March 17-20, 1970 (Washington, D.C.)	FINAL TRR promulgated December 6, 1971	
Retail Food Store Advertising Practices	November 14, 1969 TRR	Comment period originally to close April 24, 1970 Comment period extended close March 2, 1971	January 20-21, 1970 March 24-25, 1970 (Washington, D.C.)	FINAL TRR promulgated May 31, 1971	
Negative Option	May 13, 1970 TRR	Notice of REVISED PROPOSED TRR February 1972 Comment period closed May 31, 1972	November 13-19, 1970 (Washington, D.C.)	FINAL TRR promulgated February 22, 1973	
Vocational Schools	July 7, 1970 GUIDE	Comment period extended to November 5, 1970 (industry request)	December 1-7, 1970 (Washington, D.C.)	FINAL GUIDE promulgated May 2, 1972	
Cooling off Period for Door to Door Sales	September 29, 1970 TRR	Comment period closed March 15, 1971 Notice of REVISED PROPOSED TRR February 17, 1972 Comment period closed March 31, 1972	March 2-10, 1970 (Washington, D.C.) March 22-24, 1971 (Chicago, Illinois)	FINAL TRR promulgated October 26, 1972 (without effective date)	TRR amended December 7, 1973 (replaced with different one)
Franchise Disclosure	November 11, 1971 TRR	Comment period closed February 7, 1972 Notice of REVISED PROPOSED TRR August 22, 1974 Comment period closed November 20, 1974	February 14 March 1, 1972		
Detergent Labeling	January 20, 1971 TRR on labeling & advertising of synthetic detergents February 8, 1974 EPLA NPRM on detergent labeling	Comment period extended to November 16, 1971 (environmentalists' request) Comment period extended to June 24, 1974 Revised reopened June 20, 1975 Record closed July 20, 1975	April 25-28, 1971 June 16-17, 1971 June 23, 1971 (Washington, D.C.)		Cooperative Agreement to Adopt Uniform Labeling for Phosphorus Content in Nonphosphate Automatic Fabric Washing Machine Cycles, and Industry July, 1973
Asbestos	January 12, 1971 TRR	Notice of REVISED AND AMENDED TRR February 1, 1972 Notice of REVISED PROPOSED TRR October 11, 1973 Comment period closed January 29, 1974	April 13-14, 1971 (Washington, D.C.)	FINAL TRR promulgated May 3, 1974	
Matter in One Course	January 26, 1971 TRR November 10, 1975 TRR Amendment	Notice of REVISED PROPOSED TRR January 5, 1973 Record closed June 11, 1973 Final Notice February 5, 1979 Staff Report June 1978 (est.)	June 7-8, 1971 (New York, N.Y.) July 12-14, 1971 (Chicago, Illinois) September 20-23, 1971 (Washington, D.C.) March 12-16, 1973 (Washington, D.C.) May 7-9, 1973 (Chicago, Illinois) April 5, 1978 (est.) (Washington, D.C.)	FINAL TRR promulgated November 14, 1973	
Viewdata Television Pictures	April 21, 1971 REVISED TRR	Comment period closed June 28, 1971	(not required to be held)	FINAL TRR promulgated December 10, 1971	Advance of a 1967 TRR on the same subject
Mail Order Merchandise	September 23, 1971 TRR	Notice of REVISED PROPOSED TRR March 8, 1974 Comment period extended to April 15, 1974	March 27-29, 1972	FINAL TRR promulgated October 17, 1975	
Health Spas	August 16, 1978 TRR	Comment period extended to December 15, 1978 Final Notice June 1979 (est.) Staff Report Winter 1977 (est.)	are Summer Fall 1978 (est.)		10 administrative cases brought practicing public unless or proposed TRR
Mobile Homes	December 29, 1974 TRR	REPUBLICATION pursuant to Magnuson-Moss Act May 19, 1975 Final Notice Summer 1976 (est.) Staff Report February 1977 (est.)	Fall 1976 (est.)		Consent agreements with 8 major industry members announced with proposed TRR
Flammability of Children's Pajamas	August 8, 1974 TRR	Postponement of hearings due to Magnuson-Moss Act January 8, 1975 REPUBLICATION of revised TRR pursuant to Magnuson-Moss Act July 23, 1975 Final Notice mid March 1976 (est.) Staff Report September 1, 1978 (est.)	May 15 - June 15, 1978 (est.) (Washington, D.C. and San Francisco, Cal.)		Consent agreement with 29 named respondents announced July 1978

INVESTIGATION (ANNOUNCEMENT IF MADE)	ACTION PROPOSED	PAST ACTIVITY	HEARINGS (PAST AND PROJECTED)	FINAL ACTION	REMARKS
Vasectomy Brussels (May 1972)	Advance ANPR 1976 TRR	[illegible] Final Report March 31, 1978 (est.)	December 1-11 1978 (San Francisco, Ca.) December 10-19 1978 (Los Angeles, Ca.) January 12-26 1978 (Chicago, Illinois)		12 administrative cases seeking consumer redress brought, 6 set aside, 6 in litigation
Endorsements & Testimonials	December 1 1972 GUIDE	Comment period closed March 31 1973 2 revised Guides published May 21 1976 Comment period closed August 23 1976	(Not expected to be held)	FINAL GUIDE promulgated August 9, 1978	
Food Nutrition Advertising	November 11 1974 TRR	FURTHER ACTION pursuant to Magnuson-Moss Act May 22 1978 Final Notice March 7 1978	Phase I June 7 - July 2 1976 (Washington, D.C.) July 12-30, 1976 (San Francisco, Ca.) September 13 October 1 1976 (Chicago, Illinois) October 11-22, 1976 (Dallas, Texas)		
Law Books	February 28 1973 GUIDE	Comment period closed	(Not expected to be held)	FINAL GUIDE promulgated August 9, 1978	
Child Directed Premiums (August 6 1973)	July 11 1974 GUIDE	Comment period extended to September 23 1974 Publication of alternative proposal and evaluation of Guide July 7, 1975 Comment period closed September 8 1975	(Not expected to be held)		
Funeral Practices (October 1973)	August 29 1975 TRR	Final Notice February 20 1976 Staff Report September 30 1976 (est.)	April 20-27, 1976 (New York, N.Y.) May 10-18, 1976 (Chicago, Illinois) June 8-18 1976 (Los Angeles, Ca.) June 28, 1976 (Atlanta, Georgia) July 19-27, 1976 (Washington, D.C.)		1 administrative case in litigation
Credit Practices	April 11 1975 TRR	Motions to Dismiss August 17 1976, October 24 1978, November 7 1975, November 21 1975 Final Notice Summer 1978 (est.) Staff Report January 1977 (est.)	September 1976 (est.)		
Air Conditioner Labeling	August 28, 1975 TRR		(proceeding terminated)	TERMINATION OF TRR PROCEEDING as result of energy legislation	Issues will be re-addressed pursuant to recent legislation
Hearing Aids (April 3 1974)	June 24 1975 TRR	Final Notice November 30 1975 Staff Report March 15, 1977 (est.)	April 12 - May 4, 1976 (Washington, D.C.) June 7-30, 1976 (Chicago, Illinois) August 9-25, 1976 (San Francisco, Ca.) October 4-15, 1976 (est.) (Washington, D.C.)		
Prescription Drugs (May 30, 1974)	June 4 1975 TRR	Final Notice September 20, 1976 Staff Report May 30, 1978 (est.)	December 1-2, 1975 (Chicago, Illinois) December 16-17, 1975 (San Francisco, Ca.) January 12-14, 1976 (Washington, D.C.)		
Over-the-Counter Drugs (June 5 1975)	November 11 1975 TRR	Extension of time to prepare disruptive issues to March 12 1976 (request of Proprietary Association) Final Notice June 1, 1978 (est.) Staff Report October 16, 1978 (est.)	July 15-30 1970 (Washington, D.C.) (est.)		
Protein Supplements (August 22 1974)	September 4, 1975 TRR	Final Notice March 10, 1976 Staff Report December 31, 1978 (est.)	May 10-21, 1976 (Los Angeles, Ca.) July 12-16, 1976 (Ricaron, Mass.) September 13-24, 1976 (Washington, D.C.) October 19 November 8 1978 (San Francisco, Ca.)		
Fuel Economy	September 18, 1974 TRR	Record closed December 21, 1974	November 25 December 6 1974	GUIDE promulgated September 10, 1975	Commission agreed problems with EPA tests when Guide promulgated, rules being reassessed in light of recent energy legislation
Used Car Industry (April 10 1975)	January 2, 1976 TRR	Request for 90 day extension for proposing rule on used cars filed by industry trade representatives, February 23, 1976 Final Notice June 1976 (est.) Staff Report February 1977 (est.)	September 1976 (est.)		Rule required to be proposed pursuant to Magnuson-Moss Act §1108(b)
Growers, Whole Sellers, Retailers of Plants (April 26, 1976)	Proj. staff rec. to Comm April 1975				This is but one of many ongoing investigations which may result in TRR, other regulatory action, or no action
Warranty Rules, Disclosure of Warranty Terms Prevail, Availability of Warranties, Informal Dispute Settlement Mechanism (July 16, 1975)	July 16, 1975 TRR July 16, 1975 TRR July 16, 1975 TRR	Record closed for all three proceedings December 1 1975	September 16-18, 1976 (Washington, D.C.) September 27-28, 1976 (Chicago, Illinois) September 27 October 1, 1976 (Los Angeles, Ca.) October 2, 1976 (San Francisco, Ca.)	2 FINAL TRRs promulgated on December 31, 1975	These are currently executed proceedings took a substantial revised commitment in 1978
Prescription Eyeglasses Pricing (September 23, 1976)	January 16 1979 TRR	Final Notice April 15, 1977 (est.) Staff Report September 1, 1979 (est.)	June 1-7, 1978 (Washington, D.C.) (est.) June 14-20 1979 (New York, N.Y.) (est.) June 29 - July 2, 1976 (Cleveland, Ohio) (est.) July 12-16, 1976 (Dallas, Texas) (est.) July 26-30, 1976 (San Francisco, Ca.) (est.)		
Care Labeling (January 22, 1976)	January 26, 1976 REVISED TRR	Final Notice August 1978 (est.) Staff Report Spring 1977 (est.)	October 1978 (est.)		Revision of TRR promulgated December 9, 1971

EXHIBIT II

MANHOURS EXPENDED ON GUIDES AND RULES BUREAU OF CONSUMER PROTECTION (JULY 1974–MAR. 1 1976

Name of guide or rule	Number of guide or rule	Total manhours expended to date
Pesticides	R511001	773
Decorative wall paneling industry		
Use of the word "Free"		
Household furniture industry	G511198	451
Light bulb industry	R511960	153
Octane numbers	R511911	669
Feather and down industry		
Wigs and hair pieces advertising labeling	G511837	
Care labeling	R511915	1,846
Retail food store advertising and marketing practices	R511008	9,866
Negative option	R511024	
Vocational schools	R511005	10,127
Cooling off period for door to door sales	R511920	2,260
Franchise disclosure	R511003	4,184
Detergent labeling	R511013	235

Appendix F

Freedom of Information Act

INITIAL REQUESTS AND APPEALS SUBMITTED TO THE FEDERAL TRADE COMMISSION, FEB. 19, 1975—FEB. 29, 1976

	Initial requests		Appeals	
	Number	Percent	Number	Percent
Law firms	358	49.6	94	51.4
Corporations	128	17.7	22	12.0
Media	38	5.3	2	1.1
Public interest organizations	30	4.2	7	3.8
Individuals	90	12.5	8	4.4
State and local government	67	9.3	42	22.9
Individual Members of Congress	11	1.5	8	4.4
Total	722	[1] 100	183	100

[1] Due to rounding, actual total equals 100.1 percent.

Note: This table does not include requests for information from congressional committees and subcommittees or from Federal agencies.

Mr. Moss. Thank you, Mr. Chairman, and I would observe that oversight is mutually beneficial to the agencies and to the Congress because, in the course of your statement, I have made some rather careful notes for additional instructions to staff to see if perhaps we can deal with some of those problems.

This morning we are going to follow the format of giving 15 minutes to counsel to develop some necessary material for the record. Then we will go on to the 5-minute rule, alternating between members until the members have had full opportunity to ask all of their questions.

Does any other member of the Commission have a statement they would like to make at this time?

The Chair would ask unanimous consent that all appendices referred to in the course of the statement by Chairman Collier be included in the record immediately following the conclusion of his statement.

Is there objection? Hearing none, such will be the order of the committee.

The chair would also ask unanimous consent that in the course of examination by staff, that documents referred to be included in the record at the point of reference.

Is there objection? Hearing none, such will be the order.

Mr. Rosenberg, you are recognized for 15 minutes.

Mr. Moore. Mr. Chairman, I would like to note my usual objection that I made last time.

Mr. Moss. The Chair will note the objection of Mr. Moore to the ruling of the Chair and have it noted in the record and proceed on the basis of the prior stated policy.

COST-BENEFIT ANALYSIS

Mr. Rosenberg. Thank you, Mr. Chairman. Chairman Collier, the use of cost benefit analysis has been an important issue in regulatory reform. Could you briefly describe the factors used in that analysis by the Federal Trade Commission?

Mr. Collier. I can describe them as I understand them and offer my colleagues to elaborate or expand upon my understanding.

My understanding is that cost benefit analysis, is used by the Commission in making decisions in individual matters and in overall resource planning.

In recent months the Commission has had an effort underway to develop policy protocols in connection with the proposed matters that the staff is beginning to undertake. These protocols, as I reviewed a couple of them, call for the staff to ask and develop answers to questions that bear on the issue of potential cost in Commission resources and potential benefit to consumers.

I think, on first review of this matter, that this is an excellent way of communicating down through the organization the concerns that are likely to be raised by the Commissioners at various stages of the process.

Another area where I know that the cost benefit approach is employed is in the periodic reviews by the Commission of its overall resource allocation judgments. I believe that occurs about twice a year in a formal context. During that process the Commission receives the views of staff members on the most beneficial of available undertakings for the purpose of allocating our limited resources.

In my opinion, those are the two areas where the cost benefit approach is being implemented, but perhaps I am not aware of others. Perhaps former acting Chairman Dixon would care to elaborate.

Mr. Dixon. Mr. Chairman, we hear much about cost benefit analysis. Experience at the Commission would indicate that we spend a great deal of time talking about it, but have not made a great deal of progress toward developing some uniform guidelines that would apply.

I have a great deal of doubt in my mind as to whether the cost and delay involved in this sort of analysis is always worthwhile, given that it is so imprecise.

For instance, if one would ask you, if you were sitting on the Commission, as to whether or not evidence had been developed that would indicate there was a strong indication that a group of parties had engaged in pricefixing but you said, "We can't bring that case unless

we have cost benefits analyses here to indicate what benefit would flow from it." That is rather difficult.

It is like asking someone what benefits come to the economy from insisting upon competition. This issue has been most troublesome to the various members who have sat on the Commission with respect to enforcement of the so-called Robinson-Patman Act; that is, section 2 of the Clayton Act as amended.

Now, if a member or members of the staff come up and say they don't think the Commission should proceed on a complaint until it can be proven that consumers will benefit, well, we can do that if we want to but, while we are waiting, a small businessman may disappear.

All I know is that Congress has clearly indicated, through all my research and experience at the Commission, that Congress took these calculations into consideration when it passed the statute. You made a cost analysis for me when you passed the law.

I agree there must be a choice made among the various types of complaints that fall in a particular category, but must we seek some kind of a formula? I think we are kind of looking for a pie in the sky.

I would also say this: As I understand it, we have gradually come to the understanding that we ask the staff for their best opinions and evidence that they may have in hand when they submit the matter up to the Commission in the first instance, recommending some kind of an action. We ask for their opinion, and we value our staff's opinion very highly.

AMERICAN GAS ASSOCIATION INVESTIGATION

Mr. Rosenberg. I would now like, Chairman Collier, to go to the question of the American Gas Association reserves investigation. I would first like to introduce in the record a chronology of the investigation as prepared by the Federal Trade Commission.

Mr. Moss. Under the previous unanimous consent, the item will be included in the record.

[The document referred to follows:]

CHRONOLOGY OF AGA INVESTIGATION

I. INITIATION OF INVESTIGATION

By letter dated September 1, 1970, to Commissioner MacIntyre, Senator Hart, reciting the existence of allegations that natural gas producers were collectively withholding information on new discoveries of natural gas for the purpose of obtaining higher rates from the Federal Power Commission, recommended that the Commission conduct an investigation to determine whether there was a withholding of gas reserves and to determine whether such withholding and delay were attributable to a combination or other conduct violative of Section 5 of the Federal Trade Commission Act.

By minute dated October 20, 1970, the Commission directed the staff to commence an investigation into this area. On November 4, 1970, a memorandum initiating an investigation (MII) was filed.

II. ISSUANCE OF SUBPOENAS AND ENFORCEMENT

On March 16, 1971 compulsory process was requested by Bureau attorneys, after obtaining the approval of the Assistant and Bureau Director. On April 8, 1971, the Bureau of Competition was directed by the Commission to advise the Commission as to whether the information to be developed pursuant to the use of compulsory process was necessary to the public interest and whether the in-

dividuals who might be subpoenaed were likely to refuse to testify or provide requested information on the basis of their privilege against self-incrimination. The Office of General Counsel was also asked to prepare a memorandum concerning whether authorization should be granted. The Commission was concerned with whether the issuance of subpoenas would inadvertently result in the granting of immunity under Section 6004 of the Organized Crime Control Act. On April 20, 1971, Bureau attorneys submitted a memorandum to the Commission advising the Commission that the information to be developed by the use of compulsory process was necessary to the public interest and on April 26, 1971, the General Counsel's Office submitted a memorandum indicating approval of the resolutions authorizing the use of compulsory process. On May 4, 1971, the Commission minute reflects that the resolutions submitted by the Bureau of Competition on March 16, 1971, were approved. This approval was however, subject to the Chairman's Report to the Commission on the Chairman of the Federal Power Commisson's thoughts as to the use of compulsory process. On May 11, 1971, a Commission minute indicates that the Chairman of the Federal Power Commission expressed no objection to the Federal Trade Commission's proceeding by way of compulsory process. On June 3, 1971, the Commission approved an amended resolution.

After a series of deposition, a complex subpoena was drafted which issued on November 24, 1971, to 11 major oil companies. All of the companies indicated their desire to file motions to quash the subpoena. A two-week extension of time was granted by Bureau of Competition staff and most of the motions to quash the subpoena were filed in the first week of January. Various other motions were filed by the companies for items such as discovery of staff memorandum, etc., with the last motion filed February 11, 1972.

On February 17, 1972, the Bureau attorneys submitted to the General Counsel a memorandum, recommending denial of the motions to quash. On June 12 1972, the General Counsel submitted a memorandum recommending that the Commission deny the various motions to quash. On June 27, 1972, the Commission denied all the motions to quash.

On July 28, 1972, and July 31, 1972, three companies filed identical motions for reconsideration of the denial of their motions to quash. Letters of denial were sent on August 25, 1972, to all three companies. In addition, several companies filed motions for stay pending the Commission's rulings on these motions for reconsideration. These petitions for stay were rendered moot by the Commission's denial of the reconsideration. The Secretary advised the two companies of this fact on September 22, 1972.

Negotiations took place with most of the resisting companies after the denial of the last petition to reconsider. During this time period Gulf and Union agreed to comply with the subpoena. By mid-October 1972, stipulations or letters from six of the companies indicated that if a return hearing were held, they would not produce any documents. Accordingly, on October 26, 1972, the Bureau attorneys submitted a memorandum to the Commission via the General Counsel requesting authorization for the General Counsel to seek court enforcement from the Justice Department. On November 6, 1972, the General Counsel's Office sent this memo to the Commission with their recommendation that they be authorized to seek enforcement of the subpoena against these six companies. By minute of November 15, 1972, the Office of the General Counsel was authorized to prepare and transmit the necessary papers to the Department of Justice for enforcement of the subpoenas. After additional negotiations were held with Bureau of Competition attorneys it was decided that three other companies would need subpoena enforcement. Accordingly, on December 27, 1972, a memorandum was submitted. By minute of January 18, 1973, the Commission authorized the Office of the General Counsel to prepare and transmit the necessary papers for enforcement of the subpoenas issued to these three companies.

The General Counsel's Office transmitted the papers to the Justice Department on March 22, 1973. After a series of meetings with respondent's attorneys, the Justice Department, through an Assistant U.S. Attorney filed the subpoena enforcement papers on June 4, 1973, in District Court. A Preliminary Oral Argument was scheduled for July 31, 1973.

The next hearing was scheduled for December 13, 1973. During this time period Continental and Pennzoil agreed to comply with the subpoena in negotiations directly with Bureau attorneys. At the December 13, 1973, hearing the

Judge eliminated one portion of the subpoena and ordered the oil companies to submit a modified version of the subpoena by January 31, 1974. The FTC filed a response within 30 days after the oil companies filed their modified version. On March 22, 1974, Judge Hart filed an order which virtually adopted respondents version of the modified subpoena.

The General Counsel's Office filed a Notice of Appeal on May 10, 1974. On December 20, 1974, the final FTC brief was filed in the U.S. Court of Appeals. On April 18, 1975, there was oral argument. On August 8, 1975, the Court of Appeals affirmed in part and reversed in part the District Court's order, in *FTC v. Texaco*, et al., 517 F2d 137 (D.C. Cir. 1975). The General Counsel's office filed a petition for rehearing and a suggestion for rehearing *en banc* on October 3, 1975. The Court of Appeals vacated the August 8, 1975 opinion and granted the Commission's petition for rehearing and suggestion for rehearing *en banc* on February 8, 1976. Argument is set for April 1976.

In May of 1975, Kenneth Anderson, Assistant Director, Bureau of Competition and Theodore Lytle, Attorney, Bureau of Competition were subpoenaed to testify before the House Subcommittee on Oversight and Investigations of the Committee on Interstate and Foreign Commerce. They testified on June 9, 1975. Joseph Mulholland and Joanne Salop were also subpoenaed to testify and did so on June 26, 1975. Their testimony and portions of the Bureaus of Competition and Economics memorandum concerning the AGA investigation were published by the Subcommittee.

On May 30, 1975, the Bureau of Competition recommended to the Commission that a complaint be issued against the AGA and the members of the South Louisiana Subcommittee. The Bureau of Economics filed memorandum in opposition to this recommendation. On July 29, 1975 the Commission determined to continue the investigation and to continue to pursue the court enforcement proceedings.

III. INVESTIGATIONAL HEARINGS

Since the initiation of the AGA investigation, numerous investigational hearings have been held by Bureau attorneys. The following is a chronologic list of these hearings:

August 1, 1971: Pennzoil-United States, AGA Subcommittee Chairman.

September 22, 1971: Shell Oil Co., AGA Subcommittee member.

March 20–21, 1973: Gulf Oil Company, Subpoena return hearing and AGA S. Louisiana Subcommittee Member.

May 8–9, 1973: Union Oil Company, Subpoena return hearing and AGA S. Louisiana Subcommittee member.

September 11, 1974: Tennessee Gas Pipeline Co., Reserve Department personnel.

September 12, 1974: Transcontinental Gas Pipe Line Co., Reserve Contract Department personnel.

October 3, 1974: Pennzoil-United, Subpoena return hearing and AGA S. Louisiana Subcommittee member.

October 11, 1974: Texaco, Inc., AGA S. Louisiana Subcommittee representatives.

October 14, 1974: Exxon, AGA S. Louisiana Subcommittee representative.

October 17, 1974: Continental Oil Co., Subpoena return hearing.

Subpoena ad testificandum were also issued to the AGA South Louisiana Subcommittee representatives for Chevron and Standard Oil Co. of Indiana. Motions to Quash these subpoenas were filed with the Commission on September 13, 1974 and November 12, 1974.

Mr. ROSENBERG. This investigation has taken over 5 years. To what do you attribute this long period of time?

Mr. COLLIER. I know of one factor that has contributed to some delay in that matter. The source of current delay is a subpena enforcement action that is now pending in court, and that is holding up production of certain documents which, as I understand it, the staff believes are important.

I am not more familiar with the details of it. With me here this morning is Owen Johnson, the Director of the Bureau of Competition.

He is responsible for the day-to-day supervision of that matter and I am sure would be happy to elaborate on specific questions or make additional comments with regard to the progress of that matter.

Mr. ROSENBERG. Mr. Johnson, would you say resistance to the compulsory progress has been an important factor in that delay?

Mr. JOHNSON. I think it has been the major factor.

Mr. ROSENBERG. Without this resistance, the matter would have proceeded much more quickly?

Mr. JOHNSON. Definitely.

Mr. ROSENBERG. Do you believe that the documents requested in those cases are absolutely necessary to the Commission's decision upon issuance of the complaint?

Mr. JOHNSON. As you know, we have now waived the so-called All-State doctrine so that in theory, the complaint could be issued on less than a totally complete investigation. However, it would certainly help the progress of the investigation if we had the documents.

Mr. ROSENBERG. You do believe a decision on complaint could be made without those particular documents?

Mr. JOHNSON. Well, I have to answer that in the affirmative in that, as you know, Mr. Rosenberg, a complaint recommendation has been made in the past. So the Bureau of Competition believed that some form of complaint could issue, on the basis of the facts now discovered; but certainly more information would be helpful.

Mr. ROSENBERG. On July 3, 1975, while a proposed complaint in this case was pending before the Commission, Chairman Engman met with Frederick Rowe, attorney for the AGA. I would like to submit for the record a memorandum to the file from Margery Smith, assistant to Chairman Engman, which describes this meeting.

Mr. MOSS. Under the previous unanimous consent, the memo will be placed in the record at this point.

[The document referred to follows:]

FEDERAL TRADE COMMISSION,
Washington, D.C., July 9, 1975.

Memorandum to the file.
From: Margery Smith, Assistant to the Chairman.
Re: Meeting with Fred Rowe, Counsel for American Gas Association, Thursday, July 3 1975, 1:50 p.m.

Present at the meeting were: Chairman Engman, Margery Smith of the Chairman's staff, Michael Glassman of the Bureau of Economics, Robert Liedquist, Acting Director of the Bureau of Competition, Thomas Tucker, Assistant General Counsel, Fred Rowe and Edward Warren of Kirkland, Ellis, and Rowe, on behalf of the American Gas Association.

Mr. Rowe, on behalf of the American Gas Association, expressed the conviction that issuance of a complaint against AGA for underreporting gas reserves would be detrimental to the public interest. Mr. Rowe claimed that any shortage in natural gas was due to over-regulation by the Federal Power Commission which, by keeping gas prices lower than free market rates, had created a public demand for gas in excess of available supply. Mr. Rowe said it was a tragic paradox that the Federal Trade Commission, which had taken such a significant role in opposing over-regulation, should become the instrument of thwarting the deregulation of natural gas.

Mr. Rowe explained his understanding that the Bureau of Competition had backed off from alleging conspiracy charges against the AGA and was now interested in issuing a complaint based on alleged AGA underreporting of reserves to the Federal Power Commission. Such a complaint, Mr. Rowe argued, would be used to perpetuate the position of the Federal Power Commission in maintaining wellhead prices. If there were no Federal Power Commission set-

ting wellhead prices for natural gas, then there would be no need for AGA to report its gas reserves.

Mr. Rowe explained that he had received all his knowledge about the Bureau of Competition and Bureau of Economics recommendations from the memos released by Congressman Moss. He believed that Congressman Moss had released all the FTC memos. Rowe said he had never had any discussion with Jim Halverson, former Director of the Bureau of Competition, regarding any staff proposals.

Mr. Rowe said that the issuance of a complaint against AGA would result in years of costly and wasteful litigation with no assurance that the staff's objective would be reached. Mr. Rowe raised the possibility of non-formal, non-litigation action which might achieve many of the objectives of the staff. A formal complaint proceeding, Mr. Rowe argued, would publicly pit the Bureau of Competition against the Bureau of Economics which would not be in the best interest of the public or the Federal Trade Commission. Mr. Rowe said the Federal Trade Commission should not go into such a proceeding without exploring other possibilities for achieving its objectives.

According to Mr. Rowe, the AGA was interested in the possibility of revising its reporting system to achieve the objectives of reporting being sought by the Commission's staff. Chairman Engman asked whether the AGA had previously explored such possibilities with the Commission's staff. Mr. Rowe said these issues had not been raised before since the AGA did not know what position the Commission's staff was going to take until it read a report in *Platt's*. Mr. Rowe had then met with Kenneth Anderson of the Commission's staff, but this was after Bureau Director Halverson had made his final recommendation.

Mr. Glassman asked whether the AGA intended to enter into consent negotiations. Mr. Rowe replied that the AGA was not proposing consent negotiations but rather a discussion of modifications that could be made in the gas reporting system which would meet with the agreement of both the AGA and the Commission's staff.

Mr. Liedquist asked whether AGA intended to sign an order. Mr. Rowe replied that he was not authorized to enter into an order with the Federal Trade Commission. Mr. Glassman asked whether AGA would enter into a binding agreement with the Commission. Mr. Rowe replied that he was reluctant to discuss the substance of any agreement at this time. He wished to limit discussion to the form or procedure that any future discussions should take.

Chairman Engman asked what time frame Mr. Rowe had in mind for such discussions. Mr. Rowe replied that it was difficult at this time to estimate how long discussions would take, but he believed 60 to 90 days was a reasonable and realistic estimate. He pointed out that litigation would take years and that periodic progress reports could be made to the Commission during the discussion process to prevent footdragging.

Mr. Liedquist said that, as Mr. Rowe already knew, the Bureau of Competition had forwarded its recommendations to the Commission. However, he was glad to talk to Mr. Rowe while the Commission was considering the Bureau's recommendations and to keep the Commission informed of any progress. Mr. Rowe replied that it sounded as if there would be a sword hanging over the head of the AGA. Mr. Liedquist said that he was not in a position to ask the Commission to return the Bureau's recommendation without having a better idea of what the AGA proposes. Under Section 2.14 of the FTC Act, he could inform the Commission that the staff had entered into negotiations with the possibility of an order and then request Commission approval to withdraw the complaint recommendation. Mr. Rowe replied that he was not talking about a Section 2.14 situation but rather about discussion between the staff and the AGA which might result in a modification of the AGA reporting system which was agreeable to the staff. At that point, the staff would be in a position to seek return of its complaint recommendation.

Mr. Liedquist said that the Commission had not been interested traditionally in voluntary compliance. Mr. Rowe said that litigation in this case would be lengthy, and the Commission's previous position on voluntary compliance plans should not stand in the way of reaching a mutual solution; that substance should triumph over form.

Mr. Liedquist offered to talk with the AGA until the Commission acts on the Bureau's recommendation. Mr. Rowe said that as long as a possible complaint sits at the Commission level, it is like "a gun at the head," and he asked if the

Commission could send back the complaint to the staff during the pendency of the discussions. Mr. Liedquist said there would have to be some signs of progress before the staff would ask to have its recommendations returned. Mr. Rowe said it was a unique problem, and he did not know all the techniques for working out a solution but the result is what is important.

Chairman Engman pointed out that while the materials were at the Commission level, the matter had not yet been placed on the Commission agenda. While the individual Commissioners were reviewing the staff materials, it might be helpful for the staff and the AGA to discuss the issues being raised. Chairman Engman expected that the staff would keep the Commission advised as to the likely result of any such discussion, but the AGA must first provide the staff with a feeling as to the possible outcome of the discussions before any determination could be made as to whether the staff's recommendation for complaint should remain at the Commission level.

Mr. Liedquist said the staff must be able to judge whether negotiations will be fruitful. Mr. Rowe said, in other words, the staff must know enough to be able to decide whether to ask for the return of its recommendation. He would have to talk to his client about this.

Chairman Engman said that he had not formulated any judgments as to the merits of the staff recommendations. He expected the Commission might raise questions with the staff as to whether negotiations will be meaningful, but he was not in a position to make any statement at this time. He had not discussed the matter with the other Commissioners, but, for himself, he had no objection to preliminary discussions between the staff and the AGA while the Commission was considering the staff's recommendations.

Mr. Tucker asked whether the AGA petition for a meeting with the Commission was still pending. Mr. Rowe replied that it was but that he thought such a request might be premature in view of the possibility of discussions between the staff and the AGA.

Chairman Engman said that the AGA petition for a meeting would be considered by the Commission in due course. Mr. Rowe said he would be happy to discuss any issues with the Commission collectively or individually. The Chairman replied that the Commission was generally inclined to grant requests for meetings under the procedures established for meetings with outside groups. The AGA would be able to work out details with the Commission in the event the Commission granted its request for a meeting, or the AGA could withdraw its request if it no longer desired a meeting.

Mr. Tucker said that it is the Commission policy to hold open meetings with outside groups although details of any such meeting could be worked out with the Commission's Secretary. Mr. Rowe said he would be cognizant of the Commission's position with regard to meetings.

The meeting ended at 2:45 p.m.

Mr. ROSENBERG. Is this kind of meeting normally held prior to decisions on proposed complaints?

Mr. COLLIER. Is it an ordinary procedure?

Mr. ROSENBERG. Yes.

Mr. COLLIER. I don't know. It could be the Commissioners probably take their own counsel on those matters and may approach requests in different ways. I have not had the occasion personally to confront the situation, but perhaps each of the members of the Commission could elaborate on the question whether this is an ordinary process or an extraordinary one.

Mr. DIXON. It has been my policy, since 1961 when I returned to the Commission as a Commissioner, to have an open door policy. I find the best thing a Commissioner can bring to the table for a decision is as much information as he can get.

If a Commissioner gets all of his information filtered through the staff, it could be good information, but it could be so-called bias by people. So, I have always welcomed anyone coming into my office on any matter up until the time a matter enters adjudication. After that, any communications must be made on the record.

The practice Mr. Rosenberg has described is not unusual. It has been my experience that most Commissioners are receptive to listening to the public, including members of the public who are being investigated by the Commission.

Mr. ROSENBERG. Mr. Dixon, has this been the case where a proposed complaint is pending before the Commission at that particular point?

Mr. DIXON. Yes, when staff has recommended a complaint but the Commission has not yet voted on it. I sometimes find proposed respondents more knowledgeable about such matters than I am individually. How they find things out, I don't know, but I find they sometimes follow well what is going on inside the Commission.

Mr. OTTINGER. Aren't all communications concerning a pending case put on the record?

Mr. DIXON. No, sir, not until we vote a formal complaint. If it was, we might as well sit out on Pennsylvania Avenue and talk to opposing counsel because the only one that would be benefited would be opposing counsel.

Mr. SANTINI. Would the gentleman yield further?

Mr. OTTINGER. I would like to express my opinion. That subjects you to a great deal of legitimate criticism, it seems to me, and that seems to be causing real problems.

Mr. DIXON. Mr. Congressman, we get criticized from both sides. I think you are correct that it is a pretty hot seat we sit in. You understand theoretically we wear three hats. First, we are responsible for investigation through the staff and, second, we get whatever the staff develops and sit as a body measuring and weighing the evidence to decide whether we have reason to believe that a complaint should be issued. Later we sit as judges adjudicating the complaint.

Mr. OTTINGER. It seems to me that any communication with you, I don't mind your having the communication, but the people that sit with you ought to know that what they are saying to you will be part of the record, otherwise you open yourself to the genuine criticism that there may be some improper influence.

Mr. DIXON. Sometimes only one of us may be called upon by the prospective respondent. That commissioner may discuss his encounter at the table when we discuss the case, and the others are made aware of whatever was developed at such a conference or confrontation.

Mr. OTTINGER. That makes me very uncomfortable.

Mr. DIXON. Would you be uncomfortable if grand jury deliberations were made public?

Mr. SANTINI. I think an important point of distinction should be noted. As I understand it, there was a complaint pending. You are now submitting—and I think accurately—a recommendation.

Mr. DIXON. We have a recommendation from the staff. That is not a complaint pending. It is only a recommendation from the staff that a complaint be issued.

Mr. SANTINI. There is, in this instance, a 5-year ongoing investigation with recommendation for complaint. You sit as the investigator, the arbitrator of the fact, and ultimately as the determiner of the law. You tell me you sit in isolation with one of the parties to the proceeding and make an objective determination on the merit or

demerit of the hearing with no record and no opportunity for the other side to hear what representations are being made, what is being said and what is influencing your judgment.

Mr. DIXON. I might say to you the usual practice is to invite up the staff to that conference, invite the pertinent member of the staff into that conference.

Mr. SANTINI. I think the consumer or at least the general public has some position of interest in there. Who is in this private little get-together on behalf of the general public?

Mr. NYE. Let me address that briefly, Mr. Congressman. In the instance on the table right now, I was not approached by Mr. Rowe or the American Gas Association or anyone else involved in this. They didn't see fit or reason to visit me, but I was approached on a number of occasions by Mr. Johnson's predecessor and, if I may use that term, lobbied very heavily on the staff viewpoint.

If you want that on the public record as well, I think the respondent in this case, or any case, would have a right to say what is sauce for the goose is sauce for the gander. If you want to do that, fine, but, if you do, let me tell you you will severely hamper the law enforcement function of this Commission.

Mr. SANTINI. Whatever merit or demerit lies in the procedures, it seems to me, you have serious deficiencies.

Mr. MOSS. The time of counsel has expired. The Chair recognizes the gentleman from Texas.

LINE OF BUSINESS PROGRAM

Mr. COLLINS. It seems we are perhaps trying to overregulate. As Thomas Jefferson said: "The best governed is the least governed." As I read the report on all the functions you are trying to perform, apparently you have the responsibility to regulate industry every way they can be regulated. On page 8, you say:

> Accordingly, the Commission has urged a comprehensive re-examination of economic regulation to determine whether intervention in some markets is, on balance, more harmful than helpful to the public.

I think there is a lot of sense in that. I think a lot of times you interfere with business to the point I wonder if they can operate. I will give you an example. Under this line of business of reporting you all have, you have drawn up a form that is to apply to every business everywhere, and you discuss costs, sales and profits, some things that I don't see necessarily concern you.

In other words, the way we spend money in Congress, the more profits they make, the more taxes we get, and we need to get some taxes around here.

Mr. COLLIER. That matter is presently tied up in litigation and as a result we don't have the completed forms and, therefore, it is hard to assess its accomplishments. We have at the Commission full expectation that it will accomplish a good deal.

Mr. COLLINS. How long have you had it now?

Mr. COLLIER. The first form was sent out 2 years ago. The authority of the Commission to go forward with this form—the form had been held up for several years—was conferred by Congress during its con-

sideration of the Trans-Alaska Pipeline Act, which I believe was in December of 1973.

The first form for, I believe, the companies' 1973 information, was issued in 1974, and the lawsuit was brought at the tailend of 1974, or 1975.

Some companies voluntarily provided the information, but other companies resisted.

Mr. COLLINS. Do you have anything out of it so far?

Mr. COLLIER. No; only because the companies have not provided the information. What this program is designed to do is produce information about the performance of companies. The profit information which the Government currently obtains under the quarterly financial reports program is used in connection with computing the gross national product.

Profit information is used in the private sector to conduct analyses and is used also by the Government, including the Federal Trade Commission, in enforcement areas. Line of business information is essential so that we may understand how these industries are functioning.

I should indicate the line of the business form is directed not at all of American industry but only at large companies whose operations are spread across numbers of industries so that information about the particular product areas would be available from this form.

At the present time, we have that information provided by the aggregate for individual companies.

OIL AND GAS INVESTIGATIONS

Mr. COLLINS. What of the areas you are investigating now, the oil and gas industry? This industry was about 23 percent imports until we imposed price controls. It is the only industry in America with price controls. Last week or week before last, for the first time, we had more imports than exports. We have confused that market completely.

What type of government regulations or government interventions have helped alleviate our gas and oil shortage?

Mr. COLLIER. I don't feel I am personally able to answer that question.

Mr. COLLINS. Competition is trying to get involved in it.

Mr. COLLIER. Perhaps the Director of our Bureau of Economics, Mr. Frederick Scherer, can respond.

Mr. SCHERER. As I understand the question, it was what kind of government intervention or regulations?

Mr. COLLINS. What type of government intervention or regulations have helped alleviate the shortage we have because now we are more and more dependent on imports because we have had regulations that have made us more dependent. What has government done to make us more self-sufficient?

Mr. SCHERER. It is my personal view that intervention has increased our dependence on imports. I can really think of only one way in which government intervention has lessened our dependence on imports, and that is there has been some pressure by the Federal Energy

Administration and by the Federal Power Commission for natural gas producers to deliver on the contracts they had entered with pipeline companies.

In that sense, there has been probably a positive effect; that is to say, an import reducing effect. But, in general, I think the uncertainty that has been caused by regulatory controls has probably on balance increased our dependence upon imports.

Mr. Collins. I want to emphasize that if I could. Your summary statement was on balance government intervention has made this country more dependent on oil imports on balance.

Mr. Scherer. Yes, sir, that is my view. We did issue a lengthy statement on that question before the Jackson subcommittee last September 1975 where the joint views of the Bureau of Economics and Bureau of Competition staff are detailed at some length.

Mr. Moss. The time of the gentleman has expired.

The Chair would make this observation, that the line of business reporting was debated extensively on the floor of the House during the consideration in June of 1974 in the Appropriations Subcommittee on Agriculture-Environmental and Conservation Protection, and the House expressed in a loud and resounding majority voice that it expected you to pursue that line of reporting.

Then, in summary, I would say to the Bureau of Economics that I think their case is as weak as it could possibly be.

Mr. Ottinger?

Mr. Ottinger. Mr. Chairman, being last here, I think I will defer to my colleagues.

Mr. Moss. Mr. Krueger?

Mr. Krueger. Thank you, Mr. Chairman.

USED CAR QUESTIONNAIRE

We appreciate having representatives from the Commission here today. We appreciate the chairman being here.

I should like to begin my questioning by asking about the effect of some of your information gathering forays on the small businessman.

I received last summer a questionnaire, I believe it was eight pages, which went out to car dealers, a representative number of car dealers. It did not go to all, and I have asked my staff if they can find the questionnaire. Indeed, he "comes most punctually upon his hour." My staff member is here.

This file has a copy of my letter to the FTC, but not the questionnaire. I will have to rely on memory.

One of the questions in the questionnaire was "over the past year, how many people have come to your used car lot to look at used cars but have not purchased them, and for what reasons did they decide not to purchase?"

Now, that seems to me an exercise in extraordinary futility, and undoubtedly would have resulted in inaccurate information. I wonder—while I realize that on the first day on the job you can hardly defend all the actions of your predecessors any more than Members of the Congress can defend all the previous actions of the Congress—I, nonetheless, wonder whether there is anyone here familiar with

that particular questionnaire and who might be willing to discuss it with me?

Mr. COLLIER. Mrs. Bernstein?

Mrs. BERNSTEIN. Yes, sir, that letter——

Mr. MOSS. I think the Chair will have to ask all members of the staff who will be called upon to testify to rise and be sworn.

Please identify yourselves to the hearing clerk for the record.

Mr. SCHERER. Fred M. Scherer, Director of the Bureau of Economics.

Mr. JOHNSON. Owen M. Johnson, Jr., Director of the Bureau of Competition.

Mr. MOSS. Of the two gentlemen who identify themselves, do you ratify the previous statements given as though under oath?

Mr. SCHERER. I do.

Mr. JOHNSON. I do.

Mr. MCNAMAR. Tim McNamar, Executive Director.

Mrs. BERNSTEIN. Jodie Bernstein, Acting Director of the Bureau of Consumer Protection.

Mr. GRADY. Mark F. Grady, Acting Director of the Office of Policy Planning and Evaluation.

Mr. MOSS. You may proceed.

Mrs. BERNSTEIN. That letter was prepared in connection with an investigation in connection with preparation of a proposed rule on the sale of used cars. The letter was substantially modified. By that I mean some of the questions were either cut back or eliminated.

I cannot say today that I can recall each of the modifications, but it was substantially modified. The purpose of it was to inform the staff and the Commission of the direction it should take in proposing a disclosure rule for the sale of used cars as mandated by the Magnuson-Moss Warranty Act.

Mr. KRUEGER. I appreciate the response. I recall that the estimate from the FTC was that it would take 40 hours to complete the questionnaire, but upon reading the questionnaire, I think the most charitable comment would be that they had a very optimistic view of how much time it would take to put the information together.

I have cited one question from the questionnaire. Another question I recall would have required small car dealers to go back over and look into all repairs performed in order to satisfy some sort of warranty over the past—I forget whether it is 1 year or 2—but again rather an impossible task.

I think it would be futile to belabor this particular point. I don't wish to be unfair in my questioning, but I do think that it is certainly reasonable to suppose that questions sent out into the community would be reasonable in terms of the expectations that might be made upon respondents, and I don't know to what extent this questionnaire—which I am happy to hear was improved upon later—is an example of the norm in questions from the agency.

But, I do know it would be a quite impossible task to have carried out in that form, and I wonder in general whether this particular questionnaire can be considered to be a sort of norm for the agency or not and whether there is someone here who could respond to that.

Mr. COLLIER. It might be quite helpful, in view of Mrs. Bernstein's comments, to provide the committee with a before and after. It might

help to compare the questionnaire as it was originally sent out and the questionnaire that was ultimately decided upon after those people who receive it.

We have at the Commission processes by which the very questions that you raise are explored, particularly in the motions to quash process which is built into the subpena process. It allows people to come forward and point out, by virtue of their firsthand understanding of their books, what the costs and difficulties are of providing information. Then the decision can be made in a very specific context.

My own experience has been that it is extremely difficult to anticipate how difficult it will be for some individual businessman, when you send them the same questionnaire. Their businesses may just be different. Answering questions for one person may be a significantly different exercise than answering by another person.

We try, through our processes and allowing people to object to enter into the kind of exchange that produces consistently, we hope, no more information than we need to carry out the mandates of the Congress.

Mr. KRUEGER. May I ask unanimous consent for 30 additional seconds?

Mr. MOSS. You may proceed for 30 additional seconds.

Mr. KRUEGER. I would like to observe that undoubtedly that is true, and I am glad to observe there is a screening process going on in the Agency. I would suppose before the questions get that far, the task of trying to recall all people who entered a used car place for the past year, and the reasons they chose not to buy a car, it seems to me it would require many people to correct that particular information. I do think the Agency should ask reasonable questions.

I wrote to the Agency and was told that in order to save face they couldn't withdraw the questionnaire entirely, but must make some modification in it.

Thank you.

Mr. MOSS. The Chair recognizes the gentleman from Louisiana, Mr. Moore.

Mr. MOORE. Thank you, Mr. Chairman.

PUBLIC CONTACT

I would like to compliment the chairman and all the members of the Commission on your examination of the regulations on the economic market. That is unique in my experience in Government so far and I compliment you on it and urge you to pursue it.

One question that comes to my mind is that you are probably besieged, as are Members of Congress and everybody else, with the tremendous amounts of information on the particular finding you are trying to reach and, consequently, you depend so much on staff, as mentioned earlier.

I think your open-door policy is an excellent idea. But having come from 8 years in the courtroom, I realize that at the end of the trial the judge has received a mass of testimony and he often listens for conclusions in the form of oral arguments by the various parties represented.

Do you see any validity in allowing that to come into your procedures, by allowing one representative of a group to argue or pull together his case, as I am sure staff members do in trying to reach a decision in the process?

Mr. COLLIER. That is done when we are sitting in an adjudicatory capacity. We have oral argument and those portions of the record and the factual——

Mr. MOORE. I am thinking of the rulemaking process. I have had constituents in my district besiege me with letters to do away with the holder in due course rule. In this case, you have issued the rule, or you want the regulation you have proposed, after considering their written comments.

Their thought and mine is that before making the decision it would be helpful to have one or two persons appear before the Commission and argue orally before you or members of your staff as to the benefits of retaining or not retaining it.

Mr. DIXON. Recently we had before us pending a proposed trade regulation rule on the funeral industry. Now, I suppose every Member of the Congress has heard from various funeral directors who object to the rule or have a different approach to it.

Because many of these seem to have been represented by two separate associations, we held a public meeting the other day, about 1 week ago, at which we heard for 2 hours these groups and asked for anyone else who had a comment to have their say. The purpose of the task group was to try to get us to step back from a rule and go toward a guide, with which the group offered to cooperate. We did this publicly and on the record. Now, there was such a mass of it, but that was our solution.

Mr. MOORE. Do you do this on each regulation? You did it with this particular one, and my suggestion is that wouldn't this be a good idea on all your controversial regulations?

Mr. DIXON. It is difficult sometimes, because you can try a matter or hear the same issues two or three times. Usually if we are pretty well convinced that a rulemaking proceeding of some sort is appropriate, we will just deny anybody's request for argument before the Commission on that issue and go ahead and have the public rulemaking hearings. Then when the record is made, we will decide whether there is a basis and purpose for a rule and if there is we will promulgate it in its final form.

Mr. MOORE. I know this is a lot of trouble to you, but it is a lot of trouble to live under some of the rules and regulations the Government puts out. I would encourage you to allow oral argument be presented to you in the rulemaking process. I think it might well be of some use to you.

Mr. DIXON. I might say the Commission doesn't preside over all these hearings initially. We delegate this to a hearing officer and the hearing officer must make some very definite rulings during these hearings. Opportunity for oral argument before the hearing officer is afforded before the record is finally closed.

You know what the Congress did in the Magnuson-Moss Act, it strengthened our power, but with respect to rulemaking, Mr. Chairman, you will recall this especially—we have believed since 1961 or

1962 that we already had this inherent power and we had promulgated a cigarette smoking rule and many others and finally we got to an octane rating rule and the petroleum industry challenged us and found a district judge who enjoined us and we had to go to the appellate body and won there and the Supreme Court denied certiorari.

At the same time, there was a request made to confirm this by law and when Congress passed the Magnuson-Moss Act it took us out from under APA section 4 proceedings and moved us to APA section 8 proceedings.

Now, having spent my whole life in this field, Mr. Chairman, I sometimes wonder whether we have lost more than we won because you put us out in the pea patch where there are 100 lawyers or maybe 1,000 and in one case there are 22,000 members of an affected industry. Suppose all 22,000 showed up at every hearing with a lawyer, everyone says guess what, the law says I can cross-examine and I have a few questions. We are a dead duck right there.

Mr. Moore. Having been a lawyer and having been in the courtroom, I think that is a pretty good process. But, I wasn't here and won't try to defend that situation.

I understand you have hearing officers. The point is that there is a feeling that because of the tremendous responsibility and workload of you Commission members, all you hear from is staff in many instances on these regulations.

You indicated you have your open door policy, and I am suggesting you do the same thing as a body before giving final decisions on an important regulation. You should allow representatives of the industry to be here to argue before you orally instead of before a hearing examiner.

I would like to ask one other question along the same lines. To work with the theme of trying to prevent as much Government interference with our economy as possiple and also to continue the public's participation in the regulation-making process, would you think it would be helpful or not for the Congress of the United States to have the right to disapprove any regulation your Agency or your body could issue within 60 days after the time you issue?

Mr. Collier. There may be a difference of opinion among members of the Commission, but an answer is contained in testimony recently given by our general counsel, raising serious concerns about some forms of the congressional review process that are now being considered. In particular, there are concerns on our part with, for example, action by a portion of the Congress, less than the whole of the Congress because the Congress, it seems to us, in its legislative capacity, clearly should and often does, correct a problem that an agency may have produced in reaching its decision.

But, review processes, it seems to me, run the risk of leaving people in a great state of uncertainty. I have had trouble understanding how judicial review will work in this process. As a lawyer I am concerned about how a lawyer will have to represent a client in an administrative proceeding and then in a legislative process, and finally, in a judicial proceeding in some kind of sequential fashion.

I think there are problems in that regard. I am aware Congress is looking at them, but at this point I am not sure that these problems

have been adequately resolved in the proposed legislation which Congress has under consideration.

Mr. Moore. So as to the practicalities you are talking about, do you feel that your agency is working with the Congress? Or do you feel like you have such faith in your regulations that you have no fear of the Congress disapproving the regulations?

Mr. Collier. The Congress was created by Article I of the Constitution and the Federal Trade Commission was created in 1914 by the Congress. Clearly, it seems to me, that that is where the people's voice is, in the Congress, and I have no trouble at all with congressional assertions in matters of public policy. That is fundamental. I think the legislative veto proposal raises some difficult question.

Mr. Moss. The time of the gentleman has expired.

The Chair recognizes the gentleman from Nevada, Mr. Santini.

Mr. Santini. Thank you, Mr. Chairman.

CLEARANCE TO PRACTICE BY FORMER MEMBERS OR EMPLOYEES

I realize that there are involved some protections for the cat on a hot tin roof. However, I do think that many of the compounding problems in the implementation of your objective are centered around the confused rules, or at least ambiguous rules of practice and procedure. I think they contribute, at least to some instances, where criticisms have been levied of undue influence.

I think a case in point can be found in Section 4.1(b)(3) of the FTC Rules of Practice, which involves any activity of apparent impropriety. Here we have the case of Mr. Basil J. Mazines, who was with the Commission from 1949 to 1973. In 1974 he requested clearance to appear and represent three local automobile dealers. Apparently, he had seen intraagency memoranda dealing with the District of Columbia automobile cases, and he had attended a Commission meeting at which time the complaints were voted on. He had discussed the subject with the staff of the Washington Regional Office. He was granted clearance.

Now, my question is, in view of the impression in cases like this, do you feel, Mr. Commissioner, that the present rules of practice are sufficient to deal with this area, and if all of the rules of practice are sufficient, are they being properly implemented or enforced?

Mr. Collier. My general comment is that invariably, no matter how hard one tries to take care of this and describe this in the rules of practice, often these matters have to come down to the specific facts in a particular matter. This is because the overall guidance which each Commissioner has to operate under is a standard that is no more specific than "the appearance of impropriety."

Pursuant to that standard, the Commission has tried to indicate the factual information that it feels would be useful to know and which the applicant must provide in order for the Commission to make a judgment on a standard which ultimately is that generalized.

So in connection with your general question, it is always possible that a general rules change could provide better guidance but, as in so many other areas, it is the application of a specific fact to some general standard that is going to produce over time a better understanding of what the Commission is doing, and a better opportunity for the Commission to be accountable to the Congress and to the public.

It is one of the most complex areas I have seen, involving kaleidoscopic factual patterns.

Mr. DIXON. I think that the chairman has given you the difficulty that we face when we get a request for clearance. Most of the Commission staff are lawyers and they don't stay at the Commission forever, like I have. They come and they go. When they go they try to make a living.

Now, I do not think there has been reluctance by the Commission to deny clearance where an applicant has actually participated substantially on the Commission's side of a case. But I might say my general approach, and I have been there now 15 years on the Commission, has been that if I am convinced that the party did not acquire a substantial understanding and knowledge of what the matter was about, then I am prone to clear that gentleman.

Mr. SANTINI. Would you support a rule that prohibited, for a reasonable specified time, say 4 or 5 years, the appearance before the Commission of any person who previously served on the Commission?

Mr. DIXON. No, I would not. I think it would be most inappropriate. I doubt if it would be constitutional. You would be taking a man's livelihood away from him.

What expertise he had acquired would be expertise in trade regulation law as practiced by the Commission, and then he would go out and he couldn't sell that knowledge.

Mr. SANTINI. Well, I think there are enough of our brethren at law who have that knowledge.

Mr. DIXON. Oh, yes, there would be plenty of lawyers to take his place, but he would have to teach school for 5 years.

Mr. SANTINI. Well, nobody would be compelled to take the public job in the first instance, and I think it is this sort of case that creates the very negative public reaction and impression. They don't understand how fair, open-minded, objective, and totally unbiased you all are, and, as a consequence, these negative kinds of cases create the negative impressions to which we are asked to respond with some sort of rule or oversight activity.

I am concerned because I think one of the basic problems in the administrative procedure is confusion of procedures, rules, and practices.

I believe in the administrative process. Some would not, because of the kaleidoscopic nature that you have suggested.

Mr. COLLIER. Certainly the problem that you addressed is an acute one. There seems to be reasons on both sides. On the one hand you want to attract people who may for a period of time be willing to contribute their services to public service. On the other hand, you have this problem of appearances and public expectations. I would just simply urge that if Congress should pursue this they not single out one agency. If there are problems with regard to discouraging people and if these people have an opportunity to go to other agencies which do not have such rules, I suspect agencies with these rules will lose out in the talent search.

It seems to me this is the kind of a problem that has to be addressed across the board so as not to create distortions in the quality of people that the different agencies can attract.

Mr. SANTINI. With your indulgence, I would like to ask Commissioner Dole, who dissented in the aforementioned case for her reactions to my inquiry with regard to amendment to those rules.

Ms. DOLE. Mr. Santini, I agree with what the chairman has said about the possibility of discouraging able people from coming to the Commission with that type of rule. I would want to give that a great deal of thought and I think what he has said here about applying such an amendment across the board is very poor.

I did, as you know, disagree with the majority decision in the Mezines matter. I felt that it did lend itself to a possible criticism of apparent impropriety. But I want to stress that this is a subjective judgment in an extremely difficult area.

We are going case by case on these matters and trying to use our judgment to the best of our ability to determine whether there is anything in the particular matter, in the materials that the person might have seen, for example, which would give him a special advantage. But I think that you have to be careful not to have a wooden approach to the rule or to be unfair in the judgment.

So I would just reiterate that if the Congress should decide to look into an amendment restricting the participation of former Government employees in the processes of an agency it shold be applied across the board to all of the agencies and departments.

Mr. SANTINI. I would move by unanimous consent that the opinions of the Commissioners, in the case to which we have previously alluded, be incorporated in our record at this point.

Mr. Moss. The items under the previously granted unanimous consent will be included in the record at this point.

[Testimony resumes on p. 592.]

[The opinion referred to follows:]

APRIL 11, 1975.

Re Application of Basil J. Mezines, Esq., Docket 8974—Lustine Chevrolet, Inc., Docket 8975—Rosenthal Chevrolet Co., Docket 8976—Peacock Buick, Inc.

BASIL J. MEZINES, ESQ.,
Stein, Mitchell & Mezines,
Washington, D.C.

DEAR MR. MEZINES: This will confirm your clearance to participate in captioned matters.

Enclosed is Opinion of the Commission on the question of clearance of former members and employees, together with the concurring statement of Commissioner Thompson and dissenting statements of Chairman Engman and Commissioner Hanford.

By direction of the Commission.

CHARLES A. TOBIN,
Secretary.

Enclosures.

UNITED STATES OF AMERICA BEFORE FEDERAL TRADE COMMISSION

(In the Matter of the Application of Basil J. Mezines, Esq.)

COMMISSIONERS: LEWIS A. ENGMAN, CHAIRMAN; PAUL RAND DIXON, MAYO J. THOMPSON, M. ELIZABETH HANFORD, STEPHEN NYE

OPINION OF THE COMMISSION

By Commissioner Nye

Basil J. Mezines applied to the Commission on August 13, 1974 for permission to appear as attorney for respondents in three actions.[1] He must have Commis-

[1] Docket 8974—Lustine Chevrolet, Inc., Docket 897—Rosenthal Chevrolet Company, and Docket 8976—Peacock Buick, Inc.

sion approval to represent these clients because he was once an employee of the Commission. Our Rules provide that former employees must receive from us specific authority—usually referred to as a "clearance"—before they may represent a respondent or proposed respondent in a matter before the Commission if that matter was pending before the Commission in any manner while the applicant was a Commission employee.[2]

By minute order dated October 8, 1974, we granted Mr. Mezines' application. Because of the substantial confusion which exists with respect to Commission standards for granting clearances,[3] we here explained our reasons for granting Mr. Mezines' application.

Mr. Mezines commenced his employment at the Commission on October 3, 1949. He held a succession of positions of increasing responsibility and, on November 2, 1970, was appointed Executive Director. He served in that capacity until he terminated his employment at the Commission on June 30, 1973. Thereafter he served as a special consultant to the Commission for budget matters until September, 1973. As Executive Director, Mr. Mezines exercised executive and administrative supervision over all offices, bureaus and staff of the Commission, including coordination of the legal work and other programs of the Commission's major operating bureaus. Although his principal responsibility was clearly administrative, rather than legal, he was one of the Commission's chief advisors on all matters. He regularly received all non-adjudicative circulations to the Commission and attended Commission meetings at which such circulations were discussed.

The three cases for which Mr. Mezines requests clearance are part of a larger inquiry generally referred to as the "D.C. Automobile Cases". This inquiry was initiated by a minute order of October 2, 1969, in which the Commission ordered that an investigation be undertaken into the business practices of retail automobile dealers in the Washington, D.C., Metropolitan Area.

In the course of this investigation there arose a difference of opinion among the staff of the Commission as to the number of complaints which should be filed to fulfill the objectives of the Commission's program. Mr. Mezines discussed this subject with members of the staff of the Washington, D.C. Regional Office, but the record is clear that the substance of these discussions concerned the general commitment of Commission resources rather than the merits of any individual case. On May 8, 1973, the Commission approved the issuance of complaints against five dealers, three of whom are the respondents Mr. Mezines has asked to represent.

Under Section 4.1(b) of our Rules we must decide whether Mr. Mezines "participated personally and substantially" or was "officially responsible"[4] for

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[2] This requirement is set forth in Section 4.1(b) of the Rules of Practice, which provides in relevant part:

"(1) Except as specifically authorized by the Commission, no former member or employee of the Commission shall appear as attorney or counsel or otherwise participate through any form of professional consultation or assistance in any proceeding or investigation, formal or informal, which was pending in any manner in the Commission while such former member or employee served with the Commission.

* * * * * * *

"(3) The requested authorization will not be given in any case (i) where it appears that the former member or employee during his service with the Commission participated personally and substantially in the proceeding or investigation, or (ii) where the application is filed within one (1) year after termination of the former member's or employee's service with the Commission and it appears that within a period of one (1) year prior to the termination of his service the former member or employee was officially responsible for the proceeding or investigation. In other cases, authorization will be given where the Commission is satisfied that the appearance or participation will not involve any actual or apparent impropriety."

[3] See "FTC Clearances—A Study in Uncertainty", Antitrust Trade Regulation Report No. 678, p. B–1 (August 27, 1974).

[4] We have assumed that the one year date, from which official responsibility is required to be measured for Rule 4.1(b)(3)(ii), is the date of Mr. Mezines' permanent separation from the Commission, i.e., September 30, 1973. Whatever documents Mr. Mezines had access to prior to his termination we must assume he had access to while he was a consultant. Further, since Mr. Mezines worked on budgetary matters during that period, his "responsibilities", i.e., his power to affect Commission decision-making, are assumed to have considerably overlapped with his previous responsibilities. Complaints in these matters were approved on May 8, 1973, less than one year before the applicant's separation. Thus, the application for clearance dated August 14, 1974 fits into subsection (3)(ii) and should be measured by its requirement of "official responsibility" as well as by the requirements of the other subsections.

the D.C. Automobile Cases. We conclude that neither is the case. By affidavit, Mr. Mezines confirms what the records of the Commission disclose, namely, that he did not personally participate in any way in Commission action culminating in the institution of the D.C. Automobile Cases, except to make the inquiry noted above. Mr. Mezines was no more "officially responsible" for these cases than he was for any proceeding or investigation pending at the Commission during his tenure as Executive Director. Unlike a Bureau director, the Executive Director is not situated in a substantive chain of authority for any matter. For purposes of determining eligibility for clearance, we believe "official" responsibilities means responsibilities affecting the substantive development of a case. The power to affect manpower and resource allocations ordinarily has no bearing on the substantive development of a case. Thus applicant's earlier responsibilities were not "official" within the meaning of our Rule.

We are similarly satisfied that there is no "actual or apparent impropriety" [5] involved in Mr. Mezines' representation of respondents in these cases. With respect to the question of "actual" impropriety, it appears that, in addition to his inquiry to the Washington, D.C., Regional Office, it is likely that Mr. Mezines saw three intra-agency memoranda discussing the D.C. Automobile Cases, and was probably in attendance at the meeting of the Commission at which it voted to issue the complaints in the actions ultimately filed. These facts have caused us to make substantial investigation, involving the questioning of present and former employees of the Commission and a review of all of the books, files and papers Mr. Mezines may have seen concerning these cases. We are satisfied from this investigation that Mr. Mezines' contact with these cases was purely administrative in nature and directed to providing for the Commission guidance only as to how many complaints it should issue in the area. The selection of which cases should be brought was not in issue in these discussions. Examination of the specific memoranda Mr. Mezines is believed to have seen shows that they contain no information which, if now in the full and legitimate possession of these respondents, would assist them in any way in their defense in these cases or prejudice the Commission in its prosecution of these cases.

Further, although by no means decisive, it is significant that complaint counsel to whom these cases have been assigned for trial have specifically affirmed that no prejudice to Commission interests would occur if Mr. Mezines were to represent these respondents.[6] Thus, no finding of actual impropriety can be supported on the facts before us.

The more difficult question presented by this application or whether Mr. Mezines' representation of respondents would amount to an "apparent impropriety" within the meaning of Rule 1(b)(3). If we believe apparent impropriety is involved in any situation in which the public interest could be in any way threatened, even by the most attenuated hypothesis, we would simply be saying that former employees of the Commission may never practice before the Commission.[7] Although presumably Congress could enact such a law and we could so provide by rule, there is little question that the result would be to foreclose large numbers of attorneys from a practice they well understand and at which they are most competent. We believe this is too high a price for attorneys to pay in consequence of their choice to devote a part of their career to public service. Such a result, we are convinced, would be highly detrimental to the public interest.

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[5] The final clause of Rule 4.1(b)(3) imposes these additional requirements.

[6] This observation emphasizes a substantial disadvantage that former employees of the Commission have in comparison to their counterparts in private practice. In most instances in which a private attorney is asked to represent a client whose interests are adverse to those of a person the attorney has represented in the past, the matter can be expeditiously resolved by simply calling the former client's new lawyer and explaining the facts of the prior representation, whereupon a decision as to possible conflict is made, one way or the other, and the lawyers and parties proceed accordingly. Presentation of the matter to a formal authority is unnecessary except in the rarest of cases.

We find little guidance from generally accepted canons of ethics. Canon 9 of the American Bar Association's Code of Professional Responsibility provides:

"A lawyer should avoid even the appearance of professional impropriety."

Providing a measure of specificity to this general caveat, 9–109 commands:

"A lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee."

[7] Commission Rule 4.1(b) clearly implies, however, that "apparent" propriety may exist in cases other than those in which the applicant had "substantial responsibility".

We also reject any standard which would call for the automatic denial of an application if the matter involved was within an applicant's former "jurisdiction", or because he has physically proximate to those who may have been in possession of sensitive information, or because he had "access" to such information.

Instead, we conclude that the Commission is best guided in determining these applications by what it learns from careful factual investigations into the nature of the information it is reasonable to believe may have come into the possession of the applicant during his employment at the Commission, judged in the context of the specific litigation involved. At the least, if he can be satisfied that the actual possession by counsel now acting for respondent of any information which we suspect could have been learned by the applicant would not operate to the prejudice of the Commission in the prosecution of its case, or if such information is available to respondent through normal discovery procedures, we should not deny an application for clearance.

In these cases we are not only unable to identify any information Mr. Mezines could have obtained that would prejudice the Commission's prosecution of these cases, but examination of the matters involved in this litigation suggests that the existence of such information is very unlikely. These are three cases involving allegations that respondents were selling used automobiles under the pretext that they were new. These cases will not bring the Commission to the frontiers of its statutory authority; their resolution does not depend upon a focusing of broad Commission policy and their outcome should not in any way be affected by anything Mr. Mezines may have learned about the operations of the Commission during his tenure at the Commission.

We are certain that Mr. Mezines' wide-ranging authority and access to Commission information might require that he not participate as attorney for respondents or proposed respondents in many situations. Certainly cases in which there are vital considerations of strategy in investigation and trial preparation, in which confidential treatment of Commission material is important, or where similar considerations are involved, participation by a former employee can create at least the appearance of impropriety. In such cases, any former employee could well be precluded. That is not, however, one situation presented to us by reason of Mr. Mezines' application in these cases.

UNITED STATES OF AMERICA BEFORE FEDERAL TRADE COMMISSION

(In the Matter of the Application of BASIL J. MEZINES, Esq.)

COMMISSIONERS: LEWIS A. ENGMAN, CHAIRMAN; PAUL RAND DIXON, MAYO J. THOMPSON, M. ELIZABETH HANFORD, STEPHEN NYE

CONCURRING STATEMENT OF COMMISSIONER MAYO J. THOMPSON

By Commissioner Thompson

I subscribe to the principle that, like Caesar's wife, government agencies should not only *be* above reproach in their conduct of the public's business but should be so *perceived* by the public. The appearance of impropriety, no less than the substance of it, can indeed erode a society's confidence in the integrity of its basic institutions and thus damage a vital part of its inner fabric.

Agreement with a broad general principle of this kind, however, does not guarantee agreement on its application to concrete cases. A former official of this agency now engaged in the practice of law has come before us asking that we not bar him from representing a particular client merely because he happened to hold a high administrative position in this agency at the time when our case against that client was being developed. He did not actively participate in the investigation of the business firm in question nor did he personally review or evaluate the matter. His sole "involvement," rather, is that, as Executive Director of the agency, his office received, in the routine flow of paper from the lower to the upper staff levels, some memos bearing on the subject and presumably attended—because such attendance is a part of the duties of the office—the Commission meeting at which the decision was made to issue the complaint against this company.

The difficulty with a rule that would disqualify former Commission attorneys from later representing firms in matters that somehow passed over their desks during their years in public office is that the higher the office held the wider the area of disqualification. Paper flows upward here, as noted, moving from the originating staff attorney at the bottom through successive layers of reviewing officials. The squad leader sees only the paper turned out by the members of his particular squad. The platoon leader reviews the work of several squads. The company commander sees the paperwork of all the platoons, including that of all the members of the clusters of constituent squads. The battalion, regimental, and division commanders review geometrically broader expanses of the total bureaucratic terrain. At the top, it is all supposed to come together.

The Executive Director of the Federal Trade Commission, as the agency's chief administrative officer, receives every piece of paper that rises upward for decision. His office receives, in other words, the work product of more than 600 attorneys on all of their several hundreds of pending investigations. One can presume that the man who holds this office does in fact read all of this paper that pours through the agency's in-boxes but to presume that he has retained it all is to credit him with retentive powers that Providence has seen fit to bestow on few mortal men. The truth of the matter is that, save in the most exceptional of cases, a reviewer of any such massive flow of paper will have no more recollection of the individual files he saw a month ago than the assembly-line worker in an automobile plant has of the particular Chevrolets he tightened a bolt on four weeks ago. If I was presented with a list of the matters I reviewed and voted on at the Commission's weekly meeting of, say, four weeks ago, for example, how many of the products involved and offenses charged—not to mention the kind of detailed data that is the stuff of litigation—would I be able to recall? Go back six months or sixteen months and I would probably draw a blank on virtually every company name on the list. Indeed, the relative shortness of human memory is one of the sweeter blessings a compassionate Creator has seen fit to confer on His otherwise overburdened creatures. A full and complete recollection of all the fulsome details of all the bait-and-switch and carpet cases that have come before us in recent months, for example, would surely be more than a man of normal intellectual stamina could be expected to sustain with any assurance of continued mental health. Happily, however, time slowly erases our memories of the past and hands us, in their stead, fresh new pages out of the future.

What matters here is the ability of this nation's government to attract the services of able men and women, individuals with the capacity to understand and the will to resolve the grave problems that confront us everywhere. While government service can of course be richly rewarding in terms of the psychic satisfaction involved, many of our most talented people are capable of earning substantially higher economic rewards in the private sector and hence find public service a matter of great personal sacrifice under even the best of circumstances. A sweeping disqualification rule that would add still another penalty to those initial sacrifices is not, in my view, the way to improve the quality of government and thus is not likely to improve the citizen's confidence in it. Government that is not good can never be fair to the citizenry that pays for it, no matter how innocuous it might appear to be.

I see no evidence nor, indeed, the appearance of any, that this attorney took away from the Federal Trade Commission any information that could give him or anyone else the slightest advantage in the litigation of this matter and therefore support the majority's decision to let him do what he is being hired to do, namely, represent his client in fair contest with his former colleagues.

(The Matter of the Application of Basil J. Mezines)

UNITED STATES OF AMERICA BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS: LEWIS A. ENGMAN, CHAIRMAN; PAUL RAND DIXON, MAYO J. THOMPSON, M. ELIZABETH HANFORD, STEPHEN NYE

DISSENTING STATEMENT OF COMMISSIONER ENGMAN

Commissioner Engman

This matter essentially involves the Commission's interpretation of apparent impropriety with respect to applications by former employees to participate in

Commission proceedings. For purposes of resolving this application, I assume that the applicant's participation involves no actual impropriety. I also assume that he neither participated "personally and substantially in the proceeding or investigation" nor was "officially responsible" for the matter. (See Section 4.1 (b) (3) (i) and (ii) of the Commission's Rules.)

I do believe, however, that applicant's relationship in the three matters for which he seeks clearance creates the appearance that the respondents whom he supposes to represent will gain an undue advantage by virtue of his representation. Accordingly, I would deny the application.

So important is the maintenance of public confidence that we who are entrusted with it must forestall events which create the mere appearance that one side in a proceeding is receiving an improper advantage.

The majority has determined that although "it is likely that Mr. Mezines saw three intra-agency memoranda discussing the D.C. Automobile Cases, and was probably in attendance at the meeting of the Commission at which it voted to issue the complaints in the actions ultimately filed," no actual impropriety existed because the memoranda were innocuous. Although I am not convinced that these memoranda contain no sensitive information which, if known to respondents, would prejudice the Commission's prosecution, I need not resolve the question of actual effect in deciding whether applicant's participation as counsel for respondents creates the appearance of impropriety. I need merely to consider the very nature of the memoranda—candid discussions of nations directly pertaining to the issuance of complaints. In all likelihood these memoranda were sent to the Executive Director's Office while applicant was Executive Director. It is the fact that memoranda discussing this sensitive topic were addressed to the applicant which gives rise to apparent impropriety. The appearances problem is exacerbated by his likely attendance at a Commission meeting at which issuance of the complaints was discussed.

I certainly do not advocate a standard amounting to a declaration that "former employees of the Commission can never practice before the Commission." When former commission employees do not participate in and are not opposed to the internal decision-making processes with respect to a particular matter, they should not be denied subsequent participation in that matter.

However, when an attorney seeking to represent a party in a Commission proceeding was the addresses to internal memoranda describing substantive and tactical issues in a proposed complaint, and when in all likelihood the applicant has been exposed to candid internal discussion of these same issues, the Commission is obligated to deny such participation because to do otherwise will leave the public with an irrefutable impression of undue advantage to respondent.

I would not have agreed to respondents' witnessing the Commission's decision-making process in bringing this complaint, and I cannot now agree to permit respondents' interests to be represented by an attorney who was exposed to this process. That the exposure was non-participatory is beside the point.

The Commission has a duty to the public not only to *assure* it of absolute scrupulousness, but to *convince* it of that fact. In effect, the majority is asking the public to believe the Commission on blind faith. They are saying in essence, "Although the memoranda sent to applicant's office are non-public, take it from us, those memoranda really are not sensitive." This is not very convincing to me.

I am aware that a strict standard of conduct could create some hardship for those who leave the Commission's employ and wish to practice before it. This hardship may fall unevenly in that some employees are exposed to far more cases than others. In fact, those such as the applicant, who are charged with greater responsibilities while in the government will no doubt bear the greater burden when they depart from private practice—at least for a limited period of time. It is arguable therefore that a strict standard could impede the Commission's efforts to recruit highly qualified persons, especially for management positions. I have always placed great importance on the continued recruitment of able attorneys, and I would hope that a standard such as the one I propose would deter no one. But I place even greater importance on the preservation of public trust in our proceedings. Moreover, I believe that professionals who wish to serve in the government all recognize that such burdens are part of the price he is expected to pay for the privilege of public service.

UNITED STATES OF AMERICA BEFORE FEDERAL TRADE COMMISSION

(In the Matter of the Application of Basil J. Mezines, Esquire)

COMMISSIONERS: LEWIS A. ENGMAN, CHAIRMAN; PAUL RAND DIXON, MAYO J. THOMPSON, M. ELIZABETH HANFORD, STEPHEN NYE

DISSENTING STATEMENT OF COMMISSIONER HANFORD

By Commissioner Hanford

As I read the majority opinion in this matter, it would appear that the Commission's action virtually deletes the word "apparent" from Rule 4.1(b)(3). That Rule requires, *inter alia*, that clearance not be granted a former member or employee in a case where such clearance would involve either "actual or apparent impropriety." If the Commission elects, it is well within its power to alter the language of the Rule. We have an appropriate procedure for modifying a rule should we come to view it as ill-advised.

I am constrained to conclude that the clearance request in this matter is one involving "apparent impropriety";[1] and, in light of the clear language of the pertinent rule, I must therefore dissent.

Mr. Moss. The gentleman's time has expired.

The Chair recognizes the gentleman from New York, Mr. Lent.

AMERICAN GAS ASSOCIATION INVESTIGATION

Mr. LENT. I am concerned about just who should bear the onus for what appears to be an undue delay in the prosecution of the AGA case as between the FTC on the one hand, or the gas and oil companies on the other hand. Isn't it a fact that the basic thrust of the AGA case was to try to prove conspiracy on the part of the gas companies?

Mr. COLLIER. I will ask Mr. Johnson to respond to that.

Mr. JOHNSON. Certainly one thrust of the suit is to find underreporting of gas reserves which would be by some combination or agreement among the producing gas companies.

Mr. LENT. And when Judge Hart made his order on the motion to quash the very complex subpenas, didn't the terms of his order permit the FTC to pursue the conspiracy aspect of the case?

Mr. COLLIER. My recollection is that some authorization of a limited nature might have been available as a result of Judge Hart's order, but the view he took of the matter had an impact on the breadth of the discovery he was prepared to allow, and that because of the view he took of the matter it resulted in less information than the Commission felt was necessary.

Mr. LENT. I could be in error, but it is my understanding that by the terms of the judge's order the conspiracy aspect of your case was allowed. In other words, that portion of the judge's order was broad enough to avail the FTC to go forward but instead of doing that the FTC appealed the case, thus incurring additional delay.

If I am wrong, maybe you can straighten me out.

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[1] I base this judgment principally on the fact that a number of important internal documents in this case, including staff memoranda concerning the issuance of a Part II complaint, were addressed to Mr. Mezines' office while he was Executive Director of the Commission. Furthermore, a strong inference exists that Mr. Mezines was present during at least one regular Commission meeting at which the matter was discussed.

Additionally, while serving with distinction as Executive Director of the Commission from November 1970 until his retirement from the agency in June 1973, Mr. Mezines was formally charged with staff supervision of "substantive programs". In this connection I note that according to the Executive Director's official job description, Mr. Mezines' responsibilities "encompass[ed] not only administrative matters but also the direction and coordination of the legal work and substantive programs. . . ."

Mr. Collier. Our General Counsel, Mr. Lewis, has supervised that court action for the Commission and perhaps he has a comment.

Mr. Lewis. I can't recall, Congressman, the exact specifics of Judge Hart's order, but it certainly was adverse to us. When we appealed it we got an even more adverse decision from the court of appeals, and I think the critical part of that decision was that it would not enable us as a practical matter to challenge the AGA figures.

In other words, we couldn't question in any way their reliability. This ruling, it seems to me, made it very difficult to go forward based on at least some of the theories that the staff was pursuing.

We challenged that court decision and we have been granted the right for en banc review and a hearing is scheduled for next month, in April.

Mr. Lent. Now, two of the men you had working on this case were Mr. Anderson and Mr. Lytle. Is that correct?

Mr. Lewis. They are not on my staff. I am responsible only for conducting the litigation in court. I believe the men that you referred to, Mr. Anderson and Mr. Lytle are or were staff employees in the Bureau of Competition.

Mr. Lent. Well, we had Mr. Anderson and Mr. Lytle appear before this committee back in June 1975, and they indicated that with respect to the four gas companies which did comply with this subpena, they received enough information, and I will give you their exact quote—they said the company reserve data which was obtained from the four companies which complied with the subpena ". . . has enabled the staff to make sufficient analysis in comparison to confirm its conclusion that the AGA reserve reporting procedures are tantamount to collusive price rigging." So we had that determination at least on the part of these two staffers back in June.

Mr. Dixon. I think we shouldn't lay this on the staff. I don't think I am telling stories out of school in saying that when all of this information came to us at the table it was unanimous among all Commissioners that with the decisions that had been rendered by Judge Hart and by the appellate body, it would be useless to go forward with the matter unless we had all of the information that we needed.

It is like, to me, to be authorized to say I could obtain sworn statements from the principal officials of the company that they were not in agreement and never met and didn't agree on anything. I could answer that but I could not get their blow by blow actions and lay them out there and say, "Well, maybe that is what you say but when you look at these kinds of actions here you could argue that they did."

We felt very strongly that at the Commission level, regardless of what the staff attorneys felt that the decision was sound and we instructed the staff to proceed and apply for certiorari.

Mr. Lewis. The respondents in this court case are Texaco, Standard of Indiana, Superior Oil Co., Exxon, Shell, Mobil, and Standard of California.

Now, they have some information they apparently don't want us to have, and it seems to us it is important for the Commission to pursue this thing and to get the information that the Commission initially wanted, which the companies have so far strenuously resisted.

Mr. Lent. Then you disagree with the opinion of the staffers Anderson and Lytle, who felt that the information that they had obtained

from the four cooperative companies was sufficient to enable this case to go forward?

Mr. LEWIS. I think it depends, as Commissioner Dixon just pointed out. The ultimate judgment has to be made by the Commissioners, but there was more than one theory and more than one kind of complaint being considered by the Commission at that point in time, last July.

Mr. LENT. How many people did the FTC assign to this particular prosecution or case?

Mr. JOHNSON. Congressman Lent, that has differed over time. It has been as high as four or five, but currently we only have one attorney assigned from the Bureau of Competition and no one full time from the Bureau of Economics, because we are essentially awaiting the outcome of the court appeal.

Mr. LENT. I have no further questions.

Mr. MOSS. The time of the gentleman has expired. Congressman Scheuer?

DIVISION OF CONSUMER EDUCATION

Mr. SCHEUER. What is the current status of your Division of Consumer Education, Mr. Chairman?

Mr. COLLIER. I was told in connection with the briefing I had for this hearing—this is my third day on the job—that that Division has been absorbed into the rest of the Bureau. Perhaps Mrs. Bernstein can explain the current state of their activities in that area.

Mrs. BERNSTEIN. The Division itself, as a separate unit, was abolished officially the first of the year, I believe. Its functions were absorbed into other parts of the Bureau and we will be continuing those activities.

Mr. SCHEUER. Why was it abolished?

Mrs. BERNSTEIN. It was abolished mostly for organizational purposes and because——

Mr. SCHEUER. Wait a minute. Would you describe that?

Normally when you set up a separate organizational focus for an activity like consumer protection, the purpose of having it identified in one place is to make it function real. When you splatter those functions all over the landscape they tend to disappear into the mist. Is that the organizational purpose of ending the clear identity of the Division of Consumer Education?

Mrs. BERNSTEIN. Not in my judgment. The compelling need was to increase the substantive knowledge and expertise of the people who would be working on consumer education projects, rather than have it separated from the expertise that resides in the Bureau's particular subject areas, such as food or OTC drugs.

We wanted to integrate the consumer education function into the substantive area and have the staff working more directly on consumer education projects, whatever they might be.

Mr. SCHEUER. Thank you.

I have here in my hand as the familiar saying is, the original copy of a vocational training manual published a couple of years ago. I have thumbed through it and it is an excellent piece of work. I understand that approximately 100,000 copies of this were destroyed. Are you familiar with the circumstances?

Mr. COLLIER. I was familiar with the original circumstance connected with the development of the manual but I am not familiar with the point you made about its destruction.

Mr. SCHEUER. It was suggested by Mr. Tom Rosch, assistant to the then chairman, on November 29, 1973, that we ought to have a book burning.

Mr. COLLIER. I am not fond of book burnings.

Mr. SCHEUER. And a later memo came back, "Marching order received. I will destroy all but a few." It is signed by Jodie.

Are you familiar with why the 100,000 copies of what seems to me to be an excellent consumer education piece was destroyed?

Mr. COLLIER. I think it was superseded by another booklet of similar intent, but one which contained certain revisions, the details of which I don't recall.

Mr. SCHEUER. Could you tell us for the record what the deletions and revisions were that required 100,000 copies of this to be destroyed?

Mr. COLLIER. It must have been the earlier copies that were destroyed because there was a superseding booklet prepared and distributed.

Mr. SCHEUER. That is my understanding also. This is a consumer education bulletin to help young people select vocational education schools for profit, vocational education schools with a little bit more sophistication, and to inform them as to what their rights are if they think they have been bilked.

Mr. COLLIER. That is right.

Mr. SCHEUER. I served for 8 years on the Education Committee and I served on the Elementary and Secondary Education Subcommittee, and I know a good bit about the for profit education schools and many of them are excellent and doing an outstanding job and do a far better job than most of our public vocational education institutions.

But there is a fringe, as there is in most industries, there is a fringe group of schools that are transparent rip-offs and that play on these unsophisticated kids from families also that are modest both in means and in terms of their educational background.

They take pathetic advantage of these kids. They drain them of their time and of their money and promise them all kinds of pots of gold at the end of the rainbow, and they allege completion of this course will guarantee them a job and allege they have talent where modest talent may exist.

Not only do they cause significant financial drain for the kids but a lot of heartache, too.

I have read this carefully and I think it is a very prudent and restrained presentation of the fringe groups of vocational schools for profit operators who bilk these kids and take merciless advantage of them.

I would like to know why the Federal Trade Commission buckled under to the pressure of the vocational school lobby and watered down this excellent pamphlet.

Mr. COLLIER. I don't know that that is what occurred.

Mr. SCHEUER. On page 17, for example, let me read you one paragraph and you can tell us why this was deleted from the second printing, so to speak.

First, ask them how many people have successfully completed the course, in comparison to those who dropped out, and ask them the names, addresses and telephone numbers of students over the last 6 months who have graduated.

These are suggested questions to the salesman who call themselves educational counselors, advisers, consultants and the like, but are really basically door-to-door salesmen.

No. 3: Ask the salesman if the school has a cooling off policy which will allow you to cancel the contract, and allows you to cancel the contract with the school after signing. Veterans and servicemen taking a correspondence course must notify the VA by letter at least ten days after signing a contract and otherwise the contract does not take effect and all money must be refunded.

Now, in the new version they struck out the words "and all money must be refunded." Why isn't that knowledge that those kids were entitled to and why do the taxpayers have to pay to destroy 100,000 copies of a very excellent manual and have it reprinted with those words deleted, such as "and all money must be refunded." It is a requirement of the Veterans Administration.

Mr. COLLIER. I think we would like to respond in detail to the specific changes. My own recollection of that situation was that there were a whole series of changes. Only a portion of those were significant in the decision to go through a second printing.

Additional changes were made that had not been the sine qua non of the decision to go into a second printing.

Once it was decided that some changes should be made it was also felt that other changes could be made generally since it was already going into a second printing. I don't know which are which.

Mr. SCHEUER. I am going to read virtually all of the changes and you can tell me when we finish this exercise whether you think making these changes justified spending the taxpayers' money to print 100,000 additional copies of this.

This is again advice to these young kids.

Some combined correspondence-resident courses may require that all payments be made during the correspondent period. In this situation, a prospective student should make sure he or she receives a clear description of school facilities and living conditions."

Do you consider that reasonable advice?

Mr. COLLIER. I would consider it reasonable.

Mr. SCHEUER. It sounded reasonable to you? You are a bright young fellow. Now let me tell you what was deleted.

It was the following:

In this situation the prospective student should make sure he or she receives a clear description of school facilities and living conditions."

Don't you think that is advice that was legitimate for those kids to have?

Mr. COLLIER. It sounds reasonable.

Mr. SCHEUER. Let me give you another one that was cut out. This is Question 9 on page 21:

How much are you paying for what you are buying? The Federal Truth in Lending Act says all of the following information must be very clearly indicated on installment contracts.

The words "On installment contracts" were deleted so that the kid doesn't know where he should find that information.

Do you consider that a reasonable deletion?

Mr. COLLIER. There may be a reason for that, that the disclosures be on particular things and particular places, and I may or may not be accurate. It may be under-inclusive or over-inclusive.

Mr. Moss. The Chair rules the time of the gentleman is up.

Mr. SCHEUER. I ask unanimous consent that we give Chairman Collier a copy of the original and a copy of the revised, underlining where the deletions have been made, and I would like to get a statement from him justifying each of these changes and a summary statement giving me an opinion as to whether he would do this, as to whether if this came up for his judgment today he would destroy 100,000 copies of the first printing.

Mr. Moss. Under the previously agreed to unanimous consent the record will be held to receive the material requested by the gentleman.

[The following letter and enclosure were received for the record:]

FEDERAL TRADE COMMISSION,
Washington, D.C., June 23, 1976.

Hon. JOHN E. MOSS,
Chairman, Subcommittee on Oversight and Investigation, Committee on Interstate and Foreign Commerce, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: During the Oversight Hearings conducted by the Oversight and Investigation Subcommittee on March 29, 1976, the Commission was asked to review a copy of the original 1973 FTC booklet on Vocational Training and a copy of a revised version and to justify each of the changes.

Pursuant to this request the Commission's Bureau of Consumer Protection prepared the enclosed line-by-line analysis of the revisions for inclusion on page 69 at line 8 of the transcript of the Oversight Hearings.

I wish to emphasize that in approving the printing of a revised version, the Commission, in order to avoid possible prejudgment charges, deliberately declined to pass judgment on any of the substantive changes made by the staff.

Sincerely,

CALVIN J. COLLIER,
Chairman.

Enclosure.

STAFF EXPLANATION FOR CHANGES MADE IN VOCATIONAL SCHOOL CONSUMER EDUCATION BROCHURE, AUGUST 1973

A. *Page 7*

Published Version: "Fully Accredited, VA Approved"

Original Version: "Accredited by NATTS, ACBS, NHSC, CAC, TOPPS!" "Approved for Veterans!"

Rational: The purpose of the presentation on pages 7–9 is to convey to the prospective student the typical elements of the representations made by proprietary vocational schools and their sales agents. One such group of representations involves the use of the terms accredited, approved and licensed. It is the intent of the discussion to allow the consumer to place these representations into perspective while simultaneously providing a brief definition of what accreditation, approval and licensure means.

It was the feeling of the staff that the abbreviated references on page 7 to certain nationally recognized accrediting agencies were not adequate to convey to consumers the potential deceptions that are frequently involved in use of "accredited." In the first instance, abbreviations of the names of the accrediting agencies (NATTS, ACBS, etc.) would be totally meaningless to the typical vocational school consumer who is not familiar with the accreditation principles applied by the U.S. Office of Education. Moreover, listing five selected accrediting groups implies, erroneously, that the consumer only be concerned with the listed groups. It was the staff's opinion that consumers should be advised to inquire closely into accreditation no matter which agency was involved.

With regard to "VA Approved," the staff felt that this language was more commonplace among proprietary school representations. As such, consumers were more likely to encounter this representation. It is also the more troublesome misrepresentation for it implies that the Veterans Administration has directly approved a particular school. In fact, all approval procedures have been delegated to State approving agencies.

B. *Page 9.*

Published Version: "In addition, most states license and/or approve schools to operate"

Original Version: No applicable statement.

Rationale: The addition was necessary to accurately describe the most prevalent accrediting scheme established by the U.S. Office of Education under its Congressional mandate. State licensure is always a prerequisite to accreditation. Thus, some state agency has made an initial determination under state law prior to the accrediting agency's imposition of its own standards. In order to correctly describe what accreditation means, it was necessary to also indicate that state licensure supplements accreditation.

C. *Page 9.*

Published Version: "The U.S. Commissioner of Education acknowledges nationally recognized accrediting agencies for funding purposes. Students should first check to see if a school is accredited by one of these recognized bodies."

Original Version: "The U.S. Office of Education recognized *some* accrediting agencies. Students who attend schools okayed by these agencies are often eligible for federal and state assistance."

Rationale: Since the statutory scheme established by Congress expressly refers to the Commissioner of Education, his role in the recognition process for accrediting agencies was explicitly added to the statement on page 7.

The remainder of the changes are directed toward clarifying the actual purposes of the recognition process established by Congress. The Commissioner of Education is required to recognize those accrediting agencies that meet the criteria established by statute and regulation and to publish a listing of such agencies annually. In order to be eligible to participate in some federal financial aid programs, the student must attend a school that is a member of one of these recognized agencies. The Booklet quite rightly advises the consumer to be sure that his prospective school is such a member in order to avoid difficulties caused by inaccurate uses of the terms "accredited" and "recognized."

D. *Page 9*

Published Version: " * * * and have no educational value." "Dropping out is expensive."

Original Version: " * * * it may be too easy and the school may be a degree mill." No applicable statement.

Rationale: The words "degree mill" are almost a term of art in the educational field. They refer to institutions of all types whose primary intention is to generate degrees for students without the generally accepted minimum credit requirements.

The use of that term generally obfuscates the intended message of the paragraph describing dropout rates. One of the purposes of this paragraph is to inform the student that a school's drop-out rate can say something important about the school—i.e. that its courses are not of sufficient quality to induce former students to complete the entire course. As such the consumer needs to reflect on the educational value of the course and not whether it can accurately be portrayed as a "degree mill."

With regard to the added phrase "dropping out is expensive," the staff was of the view that consumers would be more likely to focus in on a school's other representations if they were apprised of the fact that dropping out of a course can bring certain financial obligations. Leaving a course prior to completion does not relieve a student of his financial obligation and consumers should be aware of this fact prior to committing themselves to enrollment.

E. *Page 9.*

Published Version: "Diploma." "A diploma or degree alone is not a guarantee of employment."

Original Version: " 'Diplomas.' " "The worth of a degree or diploma given by a vocational school is sometimes more questionable."

Rationale: Placing "diplomas" in quotation marks served no useful purpose given the discussion that follows the first sentence of the paragraph. It is clear from that discussion that the utility of having a diploma is ambiguous with regard to both their meaning and their assistance in seeking a job.

Moreover, substituting the word "certificate" for "diploma" in the third sentence is merely an editorial change. Its purpose is to inform the student that

certificates and degrees are often terms used interchangeably with the term diploma.

F. *Pages 12–13.*

Published Version: "The Value of the Course." "Required Training." Number of Jobs Available." "Other Qualifications Needed."

Original Version: "Courses of Little Value." "Training Not Required." "No Jobs Available." "Other Requirements."

Rationale: The purpose of the Booklet in general is to inform consumers concerning areas that are material to their enrollment decisions. In that regard, the Booklet in general, and pages 12–13 in particular tends to highlight these areas to focus consumers' attention.

The captions on each of the paragraphs on pages 12–13 were altered to more accurately reflect the fact that the Commission had not concluded, as a matter of fact, that all proprietary vocational schools failed to perform certain services or engaged in certain false and deceptive practices. Rather, it was the Commission's intent to inform consumers that *at a minimum* they should inquire into certain essential matters—i.e. the value of the courses to prospective employers, the degree to which employers prefer to train their own employees. the supply and demand for certain skills, and other prerequisites to employment.

G. *Page 17.*

Published Version: "must refund the total amount paid in advance."

Original Version: "and all money must be refunded."

Rationale: The final version of the booklet added a parenthetical sentence to inform consumers that veterans, by law, were given special cancellation rights. It was felt that veteran-readers of the Booklet should be informed that they must reaffirm their contracts within 10 days of signing and that if they chose not to reaffirm, all monies paid by them must be refunded by the school. In order to be faithful to the statutory language, the phrase "paid in advance" was added to indicate that the required refund relates to pre-reaffirmation payments by veterans.

H. *Page 21.*

Published Version: "may require that all payments be made." "In this situation, the prospective student should make sure he or she receives a clear description of school facilities and living conditions."

Original Version: "be careful that you are not required to make all payments during the correspondence portion. Otherwise you may be forced to make all payments before you see facilities, living conditions, and teaching staff of the school"

Rationale: The purpose of the suggestions on page 21, including suggestion #7, is to inform consumers that they should familiarize themselves with the nature of their contractual obligation. Suggestion #7 indicates that if the course is a combination home study residential course, the conumer should inquire into residential facilities prior to obligating himself on the full contract.

The problem with the original version was that it was factually inaccurate. It implies that contracts calling for payment in advance are improper per se. This is clearly not the case. The message to be conveyed is that combination courses with single contracts require that the consumer be diligent in determining what is being offered in each segment of the course.

In addition, the implicit suggestion that the student view the school's physical plant and staff prior to entering into an obligation would be impractical if the residence portion of the course was given at a site far away from the student's home. In such a case, a description might be all a student could reasonably expect.

Other Changes:

1. An explanation was requested for the deletion of the following language on p. 17:

"1. How many people successfully completed the course in comparison to the number who dropped out?

"2. Ask him for the names, addresses and telephone numbers of students over the last 6 months who graduated from the school."

The quoted language was not in fact deleted from the final version, and appears in the version now being used.

2. An explanation was requested for the deletion of the phrase "on installment contracts" from p. 21. The phrase was not deleted from the original version but rather was added to it for clarification, and appears in the version now in use.

Mr. Moss. The Chair recognizes the gentleman from New Jersey, Mr. Maguire.

Mr. Maguire. Thank you, Mr. Chairman.

DELAYS IN RULEMAKING

Mr. Collier. I am a member of the Commerce, Consumer, and Monetary Affairs Subcommittee of the Committee on Government Operations, chaired by Congressman Rosenthal of New York, who recently held hearings on the FTC. We discussed among other things delays in the rulemaking process.

It is apparent from the material that was developed by the subcommittee and also from the letter which acting Chairman Dixon sent to Mr. Rosenthal on March 10, 1976, that the pattern has frequently been a 3- or 4- or 5-year process from the beginning of interest in a particular area to some final action, be it a rule, a guide, or something else.

Chairman Moss, of course, in his opening statement has referred to the cereal case and the *Exxon* case. I am not so interested today in documenting what delay is involved in rulemaking since that is already part of the public record, but I am curious as to the response.

A number of matters have been discussed in your opening statement, including questions of staffing, poor management on which you are now taking steps. You indicate that the 300-day period which the Magnuson-Moss bill calls for as a timetable is something to aim at but that success in achieving something under a year from start to finish is premised on the absence of significant procedural motions which demand response and may temporarily disrupt the planned course of proceedings.

Now, I wonder if you could give us a little clearer statement as to just which factors in your judgment are most responsible for 3- or 4- or 5-year periods that have become customary, or at least in my judgment all too frequent.

How do you assess adequate staff, procedural difficulties, poor management, and other factors? Could you just run those down and tell us where we need to improve?

Mr. Collier. The two things that stand out in my mind are historical and account for prior delays and should not account for future delays. They were, first, the question of the authority of the Commission in the trade regulation rule area. For virtually 18 months I recall the Commission went through a period where a Federal district court told the Commission it did not have the authority. The matter went to the court of appeals and there was a substantial amount of time before the court of appeals decided it did have the authority and remanded the case back. But in so doing it indicated it was not making a decision with regard to the procedural questions as to how the Commission should go about rulemaking.

That accounted for a good deal of delay during the period.

Mr. Maguire. Let me just interrupt to ask a question on that point. That is a specific thing that happened at a specific time.

Mr. Collier. It lasted about 18 months.

Mr. Maguire. What I am talking about is a general pattern over a period of time but even with respect to that which you mentioned, what sense does it make to halt or slow down rulemaking activity just because you are challenged in court? Are you saying that rulemaking activity was slowed down during that period?

Mr. Collier. My impression was it was not slowed down until the district judge ruled that we didn't have authority. Then it seemed imprudent to a lot of people—since these are highly resource consumptive activities—to continue to pour resources on top of those proceedings. Rather, the Commission then proceeded in a more prudent fashion because the Commission would have been criticized for putting substantial resources into a proposition that a court just recently said was not lawful.

Mr. Maguire. That is a matter of judgment. What is the other matter?

Mr. Collier. That accounted for a period of about 1 year of more or less lack of progress in pending rules. I think, incidentally, I should add to that it also tends to account for slowing down proposing new rules by the agency staff. They may have been working in the early stages of something and along comes a district court and says you don't have authority, and it creates a little less urgency in proposing new matters.

Mr. Maguire. You say it may have. Do you have instances?

Mr. Collier. I do not, but I know there were a number of matters pending at the time where the Commission's staff was contemplating—and I don't have the specifics with me—the possibility of rules or cases.

The second thing was the statute itself, the Magnuson-Moss Act grandfathered in only substantially completed prior proceedings. If a proceeding was not substantially complete, then it had to go through the new procedures of that statute.

Now, I don't believe that was a large cause of delay.

Mr. Maguire. I have a whole list of things which did not have to be revised due to Magnuson-Moss, which applied only to a few cases. I have a long list of things that partake of the same difficulties that I indicated a moment ago, so it seems to me we are back to the question of: Is it staffing, or is it management, or is it interventions procedurally by the respondents?

Mr. Collier. I am going to try to make an off-the-cuff judgment. I indicated it may have been a year or more delay built into existing proceedings by virtue of the district court decision and the earlier event passage of the Magnuson-Moss Act. That is just a rough estimate and not pulled together in any statistical manner.

Mr. Maguire. Let me interject to say that only takes care of 1 year between the 300 days and the 5-year pattern.

Mr. Collier. I am not justifying the average or the entire thing. My own impression is that probably 6 to 8 months is a fair figure in some of the rules with regard to the protraction and probably closer to 6 as a result of the statute.

I would assume that arises by virtue of having to first develop the procedural rules which was done very expeditiously and then subsequently to go through the publication process, the requirement for

identification of issues, allowing requests for new written comments prior to the time of additional hearings. Rulemaking hearings are now generally, or have been, scheduled.

You asked me to identify those. Those two phenomena probably accounted for some delay in the past. I have not had an opportunity to get the kind of review that I hope to get very soon with regard to the adequacy of current staffing on various of the rulemaking proceeding, I can come back to the committee at some point, as I am sure the committee will want to do, and talk about the progress after we have been able to survey that in depth as to what occurs in the future.

Mr. Moss. The time of the gentleman has expired.

Mr. Maguire. I have only begun to ask my questions.

Mr. Moss. The Chair appreciates that that has been the experience of most of the members of the committee this morning, and he has attempted to be indulgent and in each instance has permitted 3 minutes more than the allotted time for one, 3 minutes and 35 seconds for another and 5 minutes for another and 3 minutes 45 seconds and, again, 3 minutes 45 seconds. And the gentleman from New Jersey has just been accorded like courtesy.

The Chair cannot manufacture time.

Mr. Maguire. May I ask for 2 more minutes by unanimous consent?

Mr. Moss. Is there objection?

There being none, the gentleman will proceed for 2 additional minutes.

Mr. Maguire. I simply wanted to ask specifically for some clarification on the pesticides matter which has been pending since 1968, on which no action has been taken, the franchise disclosure matter, and proposed rule of November 1971 with no final action, and the detergent labeling proposed rule of January 1971. There is nothing final yet.

Could someone speak on those three instances?

Mr. Collier. I would like to ask Mrs. Bernstein to explain the history.

Mr. Maguire. We have waited 5 years for those actions.

Mrs. Bernstein. In the pesticides matter, while no final rules have been promulgated, in fact three administrative cases were brought on the same subject. Two were immediately settled and one went into litigation. All are now settled.

I would like to make the point that very often those cases can serve as an underpinning for the final rule.

Mr. Maguire. Those are individual cases and not a proposed rule?

Mrs. Bernstein. No, but they involve the same issues and are of great importance.

Mr. Maguire. But this is 8 years later.

Mrs. Bernstein. Those cases were developed at the same time that the rule was being worked on in conjunction with EPA.

Mr. Maguire. How about franchises and detergents?

Mrs. Bernstein. On detergents, which began primarily on the issue of phosphate disclosures, a voluntary agreement was reached on phosphate disclosures so that there is only one remaining portion of that rule to be made final. It involves a very controversial matter of what information can be disclosed on the package that will be most helpful to consumers.

The particular controversy involves whether very technical scientific names which are permitted under the FPLA will be disclosed and whether that will be of any value to consumers.

We are attempting for the benefit of the Commission to make alternative recommendations which might be more useful.

The last one is the franchise rule, which has had a very extensive period of public comment. I think it is representative, hopefully, of our older proceedings and situations that no longer occur.

I can say finally it will be submitted to the Commission this month. We have had a very, very extensive period of comment and hearings and republication primarily because it will cover thousands of different kinds of businesses. It has been very difficult indeed to handle the complexities of the issues, and to develop a record and final proposals which will apply in an equitable fashion to all of those different types of businesses.

I do think, however, that our most recent rulemaking proceedings have moved much more quickly as we have developed experience with rulemaking, which is relatively recent in our history. I think that we have learned how to use those proceedings more effectively.

Mr. MAGUIRE. I hope you have, and I hope you will do better.

Mr. Chairman, may I insert for the record at this point the text of a letter from Chairman Rosenthal of the Commerce, Consumer, and Monetary Affairs Subcommittee to yourself, in your capacity as chairman of this subcommittee, dated March 22?

Mr. MOSS. The matter will be placed in the record at this point with unanimous consent.

[The letter referred to follows:]

HOUSE OF REPRESENTATIVES,
COMMERCE, CONSUMER, AND MONETARY AFFAIRS SUBCOMMITTEE
OF THE COMMITTEE ON GOVERNMENT OPERATIONS,
Washington, D.C., March 22, 1976.

Hon. JOHN E. MOSS,
Chairman, Oversight and Investigations Subcommittee, Interstate and Foreign Commerce Committee, Rayburn House Office Building, Washington, D.C.

DEAR MR. CHAIRMAN: On February 25, 1976, the Commerce, Consumer and Monetary Affairs Subcommittee of the Government Operations Committee, which I chair held a hearing on the rulemaking process in the Federal Trade Commission's Bureau of Consumer Protection. The hearing focused on delays in both the rulemaking process and public interest petitions for rulemaking. The witnesses included Paul Rand Dixon, Acting FTC Chairman; Joan Bernstein, Acting Director, Bureau of Consumer Protection; William Dixon, Special Assistant for Rulemaking, FTC; Peggy Charren, Action for Childrens Television and Lois Schiffer, Center for Law and Social Policy.

I welcome this opportunity to submit for the record of your hearings my views and findings in an effort to coordinate our oversight responsibilities.

The Magnuson-Moss Act makes rulemaking one of the FTC's most valuable and effective tools in dealing with unfair and deceptive acts and practices against consumers in the marketplace. The Commission has devoted an increasing proportion of its consumer protection resources to rulemaking activity and there is little dispute that rulemaking will take up a significant portion of FTC resources in the future.

With this new emphasis on rulemaking, it was of serious concern to this subcommittee that the process has often been characterized by delay, postponement and extension. Because rulemaking has become so important, it is critical that the process function smoothly, expeditiously and responsively. Oversight in this area is crucial. Our concern was a simple one—what are the reasons for the delays in the entire rulemaking process?

In order to illustrate the delays, the subcommittee prepared a chart which traced the progress of Commission rules and guides which were the subject of public announcement in 1974 and 1975. When the 21 rules and guides announced during that period were traced back to their date of initial investigation and traced forward to see what progress had been made, excessive delays and nonaction were revealed.

The subcommittee examined (a) delays in the initial investigation resulting in the proposed rule; (b) delays following the proposed rule (i.e., hearings postponed, comment time extended, who requests the extensions, etc.); and (c) the total time elapsing from the beginning of the initial investigation to the final rule.

The chart, the testimony at the hearing and subsequent materials submitted for the record provided the subcommittee with the following information with regard to delays:

1) The average length of time of investigation has been 19.25 months. However the chart prepared by the subcommittee on the chart prepared by the Commission reveal investigations of as long as 37 and 42 months.

2) After a rule is proposed, if a final rule were to be promulgated within the minimum statutory timeframe, it would take 10 months. There is no rule appearing on either chart which has been completed within 10 months; 2–3 years is the average.

3) For the three rules and two guides which became final during 1974 and 1975 the average length of time it took to get from initial investigation to final rule was 42.20 months. For the rules which became final prior to 1974, it is impossible to tell the length of the whole process since the Commission, in its chart —which includes rules prior to 1974, failed to include the date that the investigation leading to the rule began.

4) There had been no final action in 18 rules out of 23 which were the subject of public announcement in 1974–1975.

Citizen access to the rulemaking process should be a concern for all Federal regulatory agencies. It is especially important that an agency involved in consumer protection activity have a viable consumer access mechanism. This need was amply demonstrated by Peggy Charren and Lois Schiffer who testified to the failure of the Commission in addressing their petitions. Not only did the Commission fail to respond to the substance of the petition but, in many cases, receipt of the petition was not even acknowledged. New procedures for handling outside petitions for rulemaking have recently been initiated. These procedures include a 90-day outside limit in responding to petitions. The Commission has reported that the procedure has been implemented and all petitions received since are on schedule.

The Commission's rulemaking process is needlessly slow. Unnecessary and excessive delays dilute the effectiveness and timeliness of any rule. While none would argue that the quality and comprehensiveness of a rule should be sacrificed for speed it is clear that the Commission can and must do better than allowing rulemaking to drag on for 3, 4 and 5 years.

I believe that our hearing convincingly documented the fact of and some of the reasons for, delay. If your hearing is able to develop more detail about the causes of and solutions to the delay problem, then our joint oversight efforts will have made an important contribution toward improvement in a major aspect of the Federal Government's consumer protection apparatus.

Sincerely,

BENJAMIN S. ROSENTHAL,
Chairman.

Mr. Moss. It is obvious that we are not going to be able to conclude this morning, and the schedule of the House this afternoon is such as to suggest the probability of a significant number of rollcalls or quorum calls. We will therefore recess the hearings, subject to the call of the Chair, and we will be in touch with you and in touch with the members of the committee in an effort to determine when we can resume these hearings.

Mr. DIXON. Thank you.

Mr. COLLIER. Thank you, Mr. Chairman.

Mr. MOSS. We thank all of you for your appearance here this morning.

[Whereupon, at 12 noon the committee was adjourned subject to call of the Chair.]

REGULATORY REFORM—FEDERAL TRADE COMMISSION

WEDNESDAY, APRIL 14, 1976

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS,
COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE,
Washington, D.C.

The subcommittee met, pursuant to notice at 10 a.m., in room 2322, Rayburn House Office Building, Hon. Richard Ottinger presiding (Hon. John E. Moss, chairman).

Mr. OTTINGER. The subcommittee will come to order.

Today's hearing is the second session of the oversight-regulatory reform hearing on the Federal Trade Commission which was begun by this subcommittee on March 29. These hearings are part of a series of hearings on nine Federal regulatory agencies which are within this committee's jurisdiction. As Chairman John Moss noted in his opening statement on the FTC, the agency has made great strides since the 1960's. But many problems remain and we intend to explore those areas today.

At our first session, we questioned the Commission on delays in the handling of the American Gas Association investigation. The subcommittee was concerned about the propriety of a meeting between then Chairman Engman and attorneys for the AGA right before the Commission decided not to issue a complaint in this matter. The subcommittee also questioned the Commission regarding delays in the rulemaking process and the adequacy of Commission standards for clearance of former members or employees to appear before the FTC.

In today's session, we will continue to explore the issues outlined at the opening session. We are concerned about the length of time that it may take to make a determination in the very important *Exxon* antitrust litigation, and we will be exploring this question today. The Commission was given significant new powers in the Magnuson-Moss Warranty—FTC Improvement Act, and we will be seeking to discover whether this act has been fully implemented.

We are also concerned that the Commission may not have adequate access to corporate data. We will be discussing the problems which it has encountered in its line of business reporting program.

I want to reiterate what Chairman Moss said regarding adjudicative matters. No statement or question of a member or staff person is intended to influence the Commission decision in any adjudication. I do, however, expect the Commission to answer any question relating solely to procedures or timetables in an adjudication and the Commission staff to respond on other issues.

Since our last hearing on the FTC, I understand you, Commissioner Nye, and the Acting Director of Consumer Protection, Joan Bernstein, are leaving the Commission. The subcommittee would like to extend its appreciation and that of the public to both you and Mrs. Bernstein for the contributions which you have made to the public service with FTC. We extend our best wishes for your future endeavors.

Mr. NYE. Thank you, Mr. Chairman.

Mr. OTTINGER. In keeping with the tradition of the committee, would you stand and be sworn.

Do you promise the testimony you are about to give is the truth, the whole truth, and nothing but the truth?

Mr. COLLIER. Yes.

Mrs. DOLE. Yes.

Mr. DIXON. Yes.

Mr. NYE. Yes.

Mr. OTTINGER. Do you have any statement you would like to make at this point?

FURTHER TESTIMONY OF HON. CALVIN J. COLLIER, CHAIRMAN, FEDERAL TRADE COMMISSION, ACCOMPANIED BY PAUL RAND DIXON, COMMISSIONER; STEPHEN NYE, COMMISSIONER; ELIZABETH HANFORD DOLE, COMMISSIONER; HARRY A. GARFIELD II, ASSISTANT DIRECTOR, BUREAU OF COMPETITION; MARK F. GRADY, ACTING DIRECTOR, OFFICE OF POLICY PLANNING AND EVALUATION; AND JOAN Z. BERNSTEIN, ACTING DIRECTOR, BUREAU OF CONSUMER PROTECTION

Mr. COLLIER. I have no statement, Mr. Chairman.

Mr. OTTINGER. Let me start off with a couple of questions that are of concern to me. I will just cover a few areas; I don't know what the most efficient way is.

Would you like to concentrate on the *Exxon* case and get the questions out of the way on that first?

Mr. ROSENBERG. That is a good idea, Mr. Chairman.

EXXON LITIGATION

Mr. OTTINGER. In the *Exxon* case, the complaint was issued almost 3 years ago in 1973?

Mr. COLLIER. Summer of 1973.

Mr. OTTINGER. This is probably the largest undertaking the Commission has ever engaged in, and we are still at the point, as I understand it, of arguing over the subpena process without even the fact-gathering process before the administrative law judge having gone ahead. I find that a matter of grave concern. I think that case is of tremendous significance.

I would just like to have your assessment as to whether this scope, size, and kind of case is something the FTC can, in fact, handle, and if you are going to proceed with it, do you have adequate resources to be able to handle it, resources both in terms of personnel and in terms of legal authority.

Would you address yourself to the problem of the dispute in which the whole subpena process has bogged down and the Commission's decision not to adopt the Federal Rules of Civil Procedure as applied to this case. Then give us some idea, if you can, whether with the resources that you have or may request from us in order to be able to prosecute this case, when you would expect at least the administrative law judge proceeding would go forward and be completed, because there undoubtedly will be a court challenge to whatever decision the administrative law judge might make in this case.

I wonder if you could address yourself to those questions generally and to the status and potential of the case. I think counsel has particular questions.

Mr. COLLIER. I would like to address myself to it in that context and also I think Mr. Johnson or someone from the Bureau of Competition who, at this time, is directly involved with that matter, might be able to elaborate for the committee.

With regard to whether the Trade Commission can handle complex, protracted litigation, my own view would be that complex and protracted litigation tends to take a long time, whether it is in an administrative setting or in the courts. I don't know any situations in the recent past where one could generalize that a complex matter takes more or less time as a general rule in administrative proceedings than it would in a proceeding in the Federal district court.

There are notoriously long proceedings, particularly on antitrust matters, in both types of hearings.

With regard to the adequacy of our rules, we are constantly looking at the rules both as they apply to adjudicative and nonadjudicative matters in order to identify and eliminate unnecessary delays in those proceedings. We have already taken a number of steps to solve delay including revision in our motions to quash process which was rather lengthy. I think we have done an excellent job in collapsing the amount of time it takes to rule on those.

As to the question of resources dedicated to the Exxon matter, the Commission relies heavily on senior staff with regard to the number of attorneys necessary to conduct that litigation, and I think the Commission has been generally supportive of the requests of the staff in that connection. I would note also that the President, in his budget request, has been supportive of the requests of the Commission and in turn, the appropriations committees have been supportive of the request for resources.

Finally, with regard to the question of what the administrative law judge's timetable in that case might be, the Commissioners are not as familiar with that as the trial attorneys who are working on the matter. And perhaps with regard to any or all of these comments, Mr. Johnson or somebody on his staff would like, at this time, to elaborate a little bit.

Mr. OTTINGER. Mr. Johnson, would you stand and be sworn?

Give your name first.

Mr. JOHNSON. Owen M. Johnson, Jr.

Mr. OTTINGER. Do you swear the testimony you are about to give is the truth, the whole truth and nothing but the truth, so help you God?

Mr. JOHNSON. I do.

Mr. Ottinger. Why don't you come up and take the mike so everybody can hear you.

Mr. Johnson. Mr. Chairman, I would certainly second our chairman's statement about the conduct of the *Exxon* case. The Commission and the administration in our latest budget message have been totally supportive of this effort and, as you may know, we anticipate a sizable increase in our budget for the *Exxon* case in fiscal 1977.

With regard to the procedures applicable to that case, I think the public has to be aware that any major antitrust case, whether conducted in a Federal court or the FTC, is going to be protracted. The Exxon case, in a sense, has moved quite expeditiously through the motion phase; and we have supplied the committee with a list of the pleadings in that litigation to date which, I think, bears eloquent testimony to the magnitude of the undertaking.

The motions phase has been completed in about 18 months, and we are now at the discovery stage of that lawsuit. Chairman Moss indicated in his initial comments that we have filed a subpena of some 1600 pages, and that really is our first wave of discovery in the lawsuit.

The Commission has given the administrative law judge discretion to adopt as he sees fit the Manual for Complex Litigation that is used in the Federal courts, so I don't think our procedures in terms of first wave, second wave discovery would differ substantially from what they would be in any similar-size case in Federal court.

Mr. Ottinger. As I understand it, the Commission turned down your request for the application of the Federal Rules of Civil Procedure to this matter and insisted upon adopting new rules that are still in the process of formulation by the Commission; is that not so?

Mr. Johnson. The Federal Rules of Civil Procedure, as such, are probably inadequate for any major antitrust case and would be so recognized in the Federal courts. What our staff requested was the application of the so-called Manual for Complex Litigation which is used in the Federal courts. The Commission did not impose the use of that manual on the administrative law judge, but left him free in his discretion to adopt it.

Mr. Ottinger. Did he adopt it?

Mr. Johnson. We are adopting it in the sense that he is taking discovery in waves. I think he is following the philosophy of the manual and probably asserts more control over the discovery process than the Federal judge.

Mr. Ottinger. The problem of which rules being used is not a problem in this proceeding at this time?

Mr. Johnson. No; I don't think we could characterize the case as being hung up on procedures, no.

Mr. Ottinger. Counsel has specific questions and I will call on him and some of the members.

But in terms of the staff resources that are available for you, the information we have is that in fiscal 1975 the case was supposed to use 48 man-years of time but only used 40 man-years. In the first half of fiscal 1976, the planned resource use was 22.5 man-years but the actual use was 11.9 man-years.

What factors would you attribute to this underutilization of resources? The key question, I suppose, is do you have enough qualified

personnel on this case so that that is not an inhibiting factor in proceeding with timely prosecution of the case?

Mr. JOHNSON. To answer the last part of your question, as regards current personnel assigned to the case, we have provided the committee with a chronology of attorneys and para-legals assigned to the case. You will note that we hit a low for assigned attorneys and para-legals in mid-1975. It was a time of turnover. Our new law school graduates had not arrived. People were taking other jobs, in the Commission and outside.

We have rapidly remedied that situation, and starting in September of 1975 up to the present we have been staffed at the approximate budget levels.

Mr. OTTINGER. You had some specific questions, Mr. Rosenberg?

Mr. ROSENBERG. Thank you, Mr. Chairman.

DELEGATION OF AUTHORITY

Before going to the specifics of the *Exxon* case, I would like to ask one question which I think is related to the *Exxon* case. The American Bar Association's commission on the Federal Trade Commission in 1969 issued this report. In the report it said:

> The Agency must recognize that some of its most serious problems—such as excessive delay and the conflict at the commissioner level between the functions of prosecutor and Judge—can be solved by greater delegation of authority to the staff. We recommend that the Commission confer on its bureau directors the authority to issue complaints * * *

Why hasn't the Federal Trade Commission accepted that particular recommendation?

Mr. COLLIER. I think each commissioner may want to respond separately to that.

In my own view—and I served as senior member of the staff, as you know—I had some sympathy with the idea of general delegation by the Commission in certain areas. With regard to the complaint issuance function, however, I have had and continue to have pause about that recommendation for two principal reasons. The first is that the members of the Commission sitting at this table are confirmed by the Congress. I think that the bringing of complaints, particularly under statutes as broad as ours, in itself constitutes a policy-setting course.

The Commission was created by Congress to fill in the meaning of that broad delegation and I think that the people who have the complaint issuance authority ought properly to be subject to the kind of Congressional-Executive oversight that is implied in the confirmation process. That is my first concern.

My second concern is, if you look at the Bureau of Competition, approximately 60 percent or more of its resources are tied up in part III adjudication at any given time. That means the complaint issuing function in effect is the principal mechanism for controlling those resources. Once the matter is in part III, the Commission serves in adjudicatory position when it comes for decision.

I don't think that would be good stewardship on the part of the Commission to release control of over 60 percent of the resources Congress provides in the appropriations process.

Some criticism has been voiced of the entire administrative process that was created by Congress and adopted in the context of several agencies at the turn of the last century. There was hope at that time—and I think a lot can be said that the hope has been realized—that through the creation of an administrative agency which combined various functions of the Government, one could have a more flexible and hopefully more responsive execution and definition of legal requirements, particularly in an area, such as we are involved in, where the Congress clearly intended the Agency to fill out what that law means.

Those are my principal reasons, but I think each Commissioner might have observations because I believe that they have all thought about this matter which has been proposed on numerous occasions over the years.

Mr. Rosenberg. Are you saying you disagree with the ABA's conclusion that a major cause of excessive delay is the conflict at the commissioner level between the functions of prosecutor and judge?

Mr. Collier. I don't believe the Commissioners' deliberations account for a substantial amount of delay. Statistics might prove me wrong, but it had not been my impression at the staff level or the short time I have been a Commissioner, that the Commissioners' deliberations account for any significant portion of the delay in our proceedings. Commissioners ordinarily handle staff recommendations speedily. There might be some excessively difficult matters, but I am always impressed the dates on the memoranda are not too forward from the time the recommendations are made.

As to the question of disagreement among Commissioners and whether that might create confusion on the part of the staff in making recommendations, indeed it is the fact that many recommendations of the staff are rejected by the Commission. I think that that is inherent in the collegial process and I don't think it is bad. I think the fact that the Commissioners have the kind of accountability that is implicit in their confirmation and selection process will inevitably lead to situations where these people will reject recommendations from the staff.

Mr. Rosenberg. Would any of the other Commissioners care to comment?

Mr. Dixon. I don't know if the members of this subcommittee know the history of reorganization, but part IV created the power to delegate. There was no power to delegate anything until that became law. I was at the Commission when it arose.

The truth of the matter is that the Kennedy administration had sent up a lot of reorganization plans and the Senate just turned hands down on them and this was an embarrassment. I got a call from the White House asking me to go up and see if we could get the one for the Federal Trade Commission passed. Senator McClellan was the one who turned those down. It was embarrassing to the President not to be able to get something done. I don't think Presidents like to find out they can't get a simple reorganization plan passed.

Senator McClellan, I think, spoke for the overriding view of the Senate that they didn't take kindly to any kind of reorganization plan that took away from them the right to examine and advise and consent on the person that had the right to issue a complaint. I agree with them 100 percent and I agree now.

It would be the biggest mistake Congress ever made to do that. I don't agree with the bar a bit. That group of the bar was like the pot calling the kettle black or something.

Now, if you ever want to pass or insist upon this kind of thing, I would be the first to run up here to the Congress and recommend that you make the Commission into a court and that would solve it all. The problems you are talking about on the *Exxon* case and on other cases have occurred because we are not a constitutional court. When somebody tells us to go to hell, we have to run with our hat in hand to the court and ask, "Would you get on our side and give us a show cause or get us some information?"

There are some strategic difficulties. The Commission has in some ways the greatest of powers. It has more than the Attorney General of the United States in enforcement of the Sherman Act. As you know, there is a bill floating around up here somewhere now, I think it may have passed in some respect, that would increase the powers of the Department of Justice to use civil investigative demands. Those apply before you issue a complaint or serve one. Justice didn't even have as much power to get ready as the Federal Trade Commission.

The Federal Trade Commission has the identical powers you have in the Congress, the powers of inquisition, if you want to call it that. Now, had we chosen in the *Exxon* case to follow tradition and issued investigative subpenas, we would, in my opinion, have gone much faster because the courts will back us up there more than when you issue a complaint and issue a subpena under that complaint, then you have to say right within the commas and periods in that complaint.

There is a hell of a lot of difference between the judicial subpena and investigative subpena. We issued a complaint here without being ready is one way to say it. You have to get ready for trial. Now we are talking about whether we shouldn't change the whole process and duplicate the Federal Rules of Civil Procedure.

I have reached the point in my mind now where I am telling you, and I will tell the other Commissioners, I am not going to support that change anymore. It would be a mistake to try to duplicate a court as long as we are not a court. We still would have to go to court if we adopt what I consider discovery procedures. We don't quite have the power a judge has.

A judge would call parties in, call counsel into chambers maybe, and talk about the discovery they want and time schedules and, if one of the parties asked for these things, didn't live up to this thing, the judge might hold him in contempt. A district judge has the power to do anything. The Federal Trade Commission doesn't have that kind of power and never will unless and until the Congress of the United States decides to make it a court.

I have often thought the bar the principal reason for these things taking so long, but I don't know how to change it unless you want to tinker with due process.

Mr. OTTINGER. You think that the Federal Trade Commission should be given status as a court?

Mr. DIXON. No, sir, I think there are some disadvantages. I think the Congress did an act of genius to create the Federal Trade Commission and its approach.

The Commission can move faster than two or three or five persons, but we can also make mistakes. We are up here right now being reviewed on some of our mistakes, and I think it's a good process.

You don't review courts, and if you measure the record of the Federal Trade Commission on time, you will find the Federal Trade Commission record is good or better than the record of the constitutional courts.

Ask Mr. Levi how he is doing in the *IBM* case. Ask him that.

Mr. OTTINGER. I am not sure our whole antitrust structure is adequate to deal with the problem. My own feeling—I don't know that it is particularly relevant here, perhaps it is—is that Congress eventually is going to have to legislate much more extensively if we are really going to achieve a major breakup of some of these joint industries.

Mr. DIXON. You may be right.

Mr. OTTINGER. We are going to have to set up some kind of arbitrary guidelines, for some particular industries.

Mr. DIXON. I will volunteer without your asking me, I think antitrust in the so-called monopoly attempt, attempt to monopolize an area of our law enforcement, has been a magnificent failure.

You can blame it on a lot of people and a lot of reasons. If you want my opinion, I think that the oil industry is trying the Federal Trade Commission instead of our trying them.

Mr. OTTINGER. I am concerned about our ability to reach the really fundamental questions as to whether it is in the public interest or not to limit the degree, size, strength, and domination of particular areas in the marketplace; and whether the laws are adequate to do that. I think they are not. But still we have to struggle with the legislation we have, until we get new legislation. I think the effort the Federal Trade Commission has taken, the direction it has taken, is salutary, and it is raising some of the issues and bringing them out to the public.

The problem we are faced with here this morning is the inordinately large task that it is and the amount of time it is taking.

Mr. DIXON. The question to start the discussion was this business of delegation. I have thought about this in 15 years many, many times, and have come very close to taking a public posture on it as these criticisms come and as various committees of Congress showed varying degrees of interest on the proposal that was then current.

I thought sometimes about saying, well, if you want to do this, leave the Federal Trade Commission as a body, all you would have to do is leave the five members as a Federal Trade Commission and create one so-called administrator, give him all the power the five used to have, give him all the responsibility. But I don't think you would do it.

That pattern is something like NLRB. There the general counsel does all this. But the general counsel down there is appointed by the President and advised and consented to by the Senate.

Mr. OTTINGER. I think we are getting a little far afield.

Mrs. DOLE. I would like to make one comment, going back to your initial question. As far as the issuance of complaints, the final policy determination should be in the hands of those appointed by the President and confirmed by the Senate. There have been suggestions that, turning it around the other way, the judicial function should be split off, that all of our litigation should be handled in the Federal courts.

This would, of course, enable the Commission to interject itself at mid-level for policy determinations on matters in litigation. I think there are many reasons however, for not utilizing the Federal courts as a forum for FTC cases. Let me point out, first, that I don't believe that there has ever been any suggestion that the Commission is unable to judge the merits of a case after determining to issue a complaint. In other words, I have never heard it suggested that the Commission would be biased or unfair in some way in sitting on the case in a judicial capacity after the Commission has been involved in the issuance of the complaint.

The Commission operates within the bounds of the record, makes its determination on the record. I feel that there would be disadvantages as far as the expertise which the Commission can lend to a particular matter if all these matters were litigated in the Federal courts.

Of course another approach which has been suggested is the creation of a special trade court. But even a specialized judicial forum would not have the kind of expertise that is amassed at the Commission through the rulemaking process, guide formulation proceedings, special industry studies and reports to Congress—other aspects of our mission.

Mr. OTTINGER. I think I will call a limit on this. I think sometimes it would be useful to go over with the Commission what structural changes might be made to improve antitrust prosecution, but I think this hearing ought to be really devoted to how we are doing with what we have.

We have a number of members here. Let me give them a chance to ask a few questions and then we will pursue this further.

Do you have something, Mr. Maguire?

Mr. MAGUIRE. I will be happy to defer to counsel.

Mr. OTTINGER. Mr. Collins.

Mr. COLLINS. Thank you, Mr. Chairman.

RESTRAINT OF TRADE

I was interested in this discussion about monopolies and restraint of trade. Is the major function of the FTC to act in restraint of trade?

Mr. COLLIER. I think to act to prevent unreasonable restraint of trade.

Mr. COLLINS. Bringing up this oil situation is one situation where they raise the question of possible monopoly or restraint of trade features.

What general complaints did you have from the public as to fact this Exxon Company was acting in restraint of trade?

Mr. COLLIER. I don't recall the record with regard to that matter at the time the matter went into adjudication.

Mr. COLLINS. Just tell me how many people were around implying and saying Exxon had been unfair and restrained them or limited them.

Mr. JOHNSON. I can speak for the initiation of the investigation which led to the complaint, which was internally generated. Our Bureau of Competition and the Bureau of Economics conducted studies on concentration of industry and targeted petroleum as an industry we should investigate. We began a formal investigation of that industry starting in 1972.

I suppose that, in 1973, with the advent of the energy crisis, there was a lot of public pressure brought to bear on the Commission over the conduct of that investigation.

Mr. COLLINS. Most of that pressure came out of Congress who, in its wisdom, decided the oil industry was a target that should receive consideration. I think most of the encouragement you have received has been from Congress. It has been my experience that the biggest restraint business has is from Congress, itself.

As we were talking I started jotting down all the things I thought about. Inflation is a problem for them; that is caused by the budget deficit and deficit financing we have here; they operate under price controls and allocation. They have tremendously increased costs through the reports and requirements we make; they are not able to take care of business; they are constantly subject to harassment and investigations; they are burdened in foreign trade through the handicaps we place on prices and everything else here in Congress, their markets, I thought of OSHA, environmental control, affirmative action. Congress is the real burden they have.

Has the Commission ever thought about investigating Congress to see what they do to restrain trade in business? Do you have the power to do it?

Mr. JOHNSON. I don't believe we do.

Mr. DIXON. Congress is the people, these things come from the people.

Mr. COLLINS. Congress is responsive to the press.

Mr. DIXON. I think everybody is responsive to the press.

Mr. COLLINS. As I see these situations around here, as we constantly go after it, if I ever saw a group of timid souls, it's the Exxon group. I live in an oil State, and I never saw a group that tries to hide under a rock anymore than they do.

If they have been involved in any restraint of trade, or involved in any type of restraint, I can't imagine what it is. They are so timid they are afraid to cross the street without a Boy Scout to help them.

Mr. DIXON. In some areas I agree, I think they ought to lay what they do on the table. You will live a long time before some of them lay something on the table. Our experience has been that way. I don't think they have that much to hide.

Mr. COLLINS. Let me go into laying on the table and hiding things. I think this affirmative action is the biggest handicap we put on business. They say you can't choose executive personnel based on experience, knowledge, ability, or anything. You have to determine it on a quota basis, which is the same as an alphabet.

In other words, you have the same number of aged, the same number of young, the same number of men, same number of women, the same number of blacks, same number of whites, and homosexuals. Nowhere in there do you list merit. How can a big business be run where you don't pick competent people to run it? This affirmative action is the biggest restraint I see coming on the horizon.

It's an interpretation. That law we passed said there would be no reverse discrimination. They are putting an interpretation in it and are going to handicap business.

Let's get on something close to home you are investigating. Who put the bee in your bonnet on this? There is an outfit down in Texas

called Gibsons; I have been reading about them in the papers. Apparently their crime is that they sell at a low price, not below cost, but, because they sell at a low price, that is some kind of a system that requires investigation by FTC. What is your opposition to selling at a low price?

Let's take a specific case you are investigating. What is wrong with selling at a low price?

Mr. COLLIER. I am advised that is beyond the investigation stage and is presently in the adjudication stage.

Mr. COLLINS. Then you can't discuss it.

Is there anything not in the quasi-judicial stage that you can discuss where they are selling at a low price?

Mr. DIXON. The dairy industry is such. I am speaking of it as an industry, not a case that we might have. We have had over the last 15 years at least several hundred complaints, usually from small, viable, family-owned dairies. They are people who do up to $2 million, $4 million, $5 million, $7 million worth of business a year.

Suddenly in their area somebody decides to use milk at the retail counter as a loss leader. Now, if you were selling milk and it cost you 35 cents to bottle and put it in a carton, a quart of milk, if that is what it cost you, and suddenly one of your so-called competitors had given somebody a price, or decided to sell milk for 34 cents to the customer, you would be in a hell of a shape.

Mr. COLLINS. I agree with that.

Mr. DIXON. If somebody sells beneath cost, the question of whether it is beneath the other man's cost has to be determined; somebody has to look at it.

Mr. COLLINS. The only responsibility is to be sure they didn't sell below their cost?

Mr. DIXON. No; we have to examine them, we have to do our best to determine whether they were selling not below cost, that is, the fellow who cut his price, because then we might not have a cause of action. He is entitled under any law we enforce to sell at any price he pleases unless we can show that he is not doing it throughout his market, rather than only where his competitor is.

Mr. COLLINS. Do you have other things—you say you are talking about—the question is have they sold it below their cost?

Mr. DIXON. That is one question. They don't have to be selling beneath their cost. If they discriminate in price, that violates the Robinson-Patman Act.

Mr. COLLINS. How would they discriminate in price?

Mr. DIXON. Suppose he was a dealer in your area. He sold widely across Texas, but in Houston he decided he didn't have enough of the market and there he decided to sell about 5 cents under the going price in the market in Houston. That would turn the market up side down. You would have to meet it or lose your customers. That is all there is to it.

Mr. COLLINS. That is right.

Mr. DIXON. It would be a market discrimination if he only sold it in Houston at that lower price and he sold everywhere else at a higher price. It could be said he sold higher elsewhere to get the money to subsidize in the Houston market where he is going to torpedo his competitor.

If you go down there and raise hell about the low price, somebody will say, "Are you mad at consumers getting milk cheap?" Take all the mothers. I saw somebody go down there and almost get killed. He took the wrong side.

Mr. COLLINS. You are saying within the same or relatively similar market——

Mr. DIXON. It brings the Robinson-Patman Act into effect with all the defenses and burdens. This isn't just there in milk, in all kinds of industries we get these complaints—they come from the businessmen. A large number come from you here in Congress; they know you, write you, and you pass the buck down to us, and it stops right there. We have to put up or shut up.

Mr. OTTINGER. Mr. Maguire.

DELAYS IN RULEMAKING

Mr. MAGUIRE. First of all, Mr. Chairman, I want to just put a footnote on the discussion that we had last time that Mrs. Bernstein participated in with regard to three areas which the Commission has had under consideration, pesticides, franchise disclosure, detergent labeling.

We didn't have enough time to get into all of the details when we discussed those matters last time. I don't want to go into all the details here now, but I wonder if we might ask if you would submit a written commentary, not just on what caused the delays, but also what lessons have been learned from the experiences in these three cases.

In other words, I would like to know what the reason, not that a delay occurred when such and such a memorandum went from somebody to somebody else, or such and such a petition was filed by so and so, but I would like to have an analysis of what the reasons were for these various entanglements and what is learned from those experiences about how to prevent the same thing from occurring in the future and what steps might in fact be taken or in fact are being taken to preclude that from being perpetuated in each and every case which comes before the Commission.

Is that something that you think you might be able to do?

Mr. COLLIER. Speaking personally, it's very timely. I have just come to the Commission as chairman and that is an excellent suggestion. I will discuss it with the staff, and I am sure we will be able to do it.

Mr. OTTINGER. Without objection, we will make that part of the record.

[The following letter was received for the record:]

FEDERAL TRADE COMMISSION,
OFFICE OF THE CHAIRMAN,
Washington, D.C., May 19, 1976.

Hon. JOHN E. MOSS,
Chairman, Subcommittee on Oversight and Investigation, Committee on Interstate and Foreign Commerce, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: During my recent appearance on April 14, 1976, before the Subcommittee on Oversight and Investigations, Congressman Maguire asked me to review the history of three pending rulemaking proceedings (specifically, franchises, detergent labeling, and pesticides). He asked whether lessons could be derived from these experiences that would permit us to avoid delays in future proceedings. This letter responds to that inquiry.

As a general matter, a major cause of delay in Commission rulemaking was the two-plus years of uncertainty occasioned by a court challenge to our legal authority to promulgate trade regulation rules and by Congressional changes in our procedures for promulgating such rules. See *National Petroleum Refiners Association* v. *FTC*, 340 F. Supp. 1343 (D.D.C., 1972), *aff'd.* 482 F.2d 762 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 951 (1974); Magnuson-Moss Warranty—Federal Trade Commission Improvement Act. P.L. 93-637 (1975). However, delays in the three specific rulemaking proceedings were also a product of peculiar factual circumstances unlikely to be repeated in the future.

First, some delay in the proposed franchise rule is the direct result of its broad coverage. The proposed rule is not limited to a particular industry, but rather would cover certain business practices affecting numerous industries and types of businesses. A thorough understanding of the effects of such a rule needed analysis of hundreds of different factual situations. The scope of this undertaking is demonstrated by the size of the record in this proceeding which exceeds 30,000 pages.

Second, the requirements of the proposed detergent rule were partly satisfied by the detergent industry's 1973 agreement to comply with the rule's disclosure provisions as to phosphate content. The remaining part of the rule, regarding disclosure of detergent ingredients, was converted into a proceeding under the Fair Packaging and Labeling Act and published for comment in February, 1974. Staff concern about whether ingredient listing would be meaningful to consumers has resulted in further exploration of this proposal.

Third, while the proposed pesticides rule was being held in abeyance, pending final decision as to the Commission's rulemaking authority in *National Petroleum Refiners*, the three major U.S. pesticide manufacturers consented to Commission orders requiring the same relief. Staff is now reexamining this area to determine whether further rulemaking activity is appropriate.

For the future the Commission is determined to take steps to minimize the possibility of unnecessary delay. Last year the Commission adopted an entirely new set of rulemaking procedures to take account of the Magnuson-Moss Act. Those rules set specific time limitations within which the various phases of the proceeding must be completed. The Commission also designated a specialized staff of attorneys to preside at rulemaking hearings. The staff of the Bureau of Consumer Protection has employed computers to organize large, complex rulemaking records, and regular seminars have been held to train the staff in rulemaking. As the presiding officers become more skilled in managing hearings and as the Bureau staff become more experienced in rulemaking, we should be able to speed up our proceedings. In fact, current rulemaking proceedings seem to be moving forward more rapidly than in the past.

Finally, your oversight hearings have quite correctly focused to a significant degree on the Commission's rulemaking activity, and I hope they will continue to do so. Our new procedures can profit by being scrutinized with a critical eye, and I fully expect and welcome such scrutiny in the future.

Sincerely,

CALVIN J. COLLIER,
Chairman.

AMERICAN GAS ASSOCIATION INVESTIGATION

Mr. MAGUIRE. The next matter I would like to take up is a matter of great concern to this committee over the past year, namely, the American Gas Association reporting of natural gas reserves.

I have reviewed a memorandum which shows that the Commission directed the staff to commence investigation on October 20, 1970, and I followed it through its tortuous five pages detailing every motion that was filed and each and every effort on the part of the oil companies in question to frustrate the forward motion of the investigation.

It seems like each time a piece of paper has to be prepared on either side that it takes a minimum of 6 months and frequently a decision on a procedural matter takes a year or longer.

So here we are in 1975, in May, and the Bureau of Competition recommending to the Commission that a complaint be issued against

the AGA and the members of the South Louisiana subcommittee of the AGA, then we have a memorandum in opposition from the Bureau of Economics, and then in July 1975 the matter is not concluded with the issuance of a complaint or any further action, but rather the matter is turned back to the staff by the Commission suggesting that the investigation be pursued.

In the first half of fiscal 1976, however, only seven-tenths of a man-year of professional time was expended on the case, which doesn't look like a very serious continuing effort on the part of the FTC.

My question is: Where is this investigation going? What is the intention of the Commission? What can we expect from this investigation, which I regard as of the utmost importance?

Mr. COLLIER. The current status of the matter is that the judicial proceedings with respect to enforcement of subpenas are still pending. With regard to——

Mr. MAGUIRE. Subpenas which you decided back in 1971, I believe, to issue?

Mr. COLLIER. That is correct.

Mr. MAGUIRE. It's now 1976.

Mr. COLLIER. That is correct.

Mr. MAGUIRE. That is a fairly impressive record of success on behalf of the respondent, is it not?

Mr. COLLIER. If delay was their objective, that is success.

Mr. MAGUIRE. So what do we do about it?

Mr. COLLIER. We have—and I don't mean to indicate there are in my view any panaceas, but I think Congress has already done some things at our request that will result in nonreplication of certain of those reasons for delay.

For example, first in connection with the Alaska Pipeline Act and later in connection with the Magnuson-Moss Act, Congress conferred upon the Commission authority to conduct its own litigation with regard to these matters without relying on the Justice Department.

I think the chronology that you have indicates that that accounted for some of the delay.

In addition, the Commission has, as I indicated a little earlier, made revisions in its motion to quash practices, which again in this case accounted for some delay. We have supported legislation before the Congress—I testified upon it just over a week ago—that would make further changes in our compulsory process authority which, in the view of a majority of the Commission, would further reduce the amount of delay occasioned by attempts to enforce compulsory process.

I don't mean to suggest that all of that is the whole answer to making sure that Commission proceedings are expeditious but certainly that case stands as a good example of the fact that compulsory process can be a significant cause for delay at the Federal Trade Commission.

With regard to the current course of the investigation, which you also asked about, I would like an appropriate member of the staff of the Bureau of Competition to respond in some detail to that, and also to the observation you made with regard to the seven-tenths of 1 man-year expended by way of resources during the first half of fiscal 1976.

Mr. MAGUIRE. Is this staff person the one that spent that seven-tenths of a man-year on the matter, or is it someone else?

Mr. JOHNSON. We have Harry Garfield, the assistant director in charge of that investigation, here with us today. I don't know whether it is Harry's time reported or one of his staff attorneys, but if you want to ask questions in depth——

Mr. COLLIER. Our reporting system in regard to man-years doesn't include the supervisory personnel but perhaps Mr. Garfield can comment.

Mr. OTTINGER. Mr. Garfield, will you please stand?

Do you promise the testimony you are about to give is the truth, the whole truth, and nothing but the truth, so help you God?

Mr. GARFIELD. Yes.

First of all, I want to preface what I am going to say by stating that I became responsible for this case in the fall of this year and, while I am familiar with the history of it, there may be details as to particular activities before that time that I will have to consult my own staff about.

I assume that the seven-tenths of a man-year represents the time of my staff, and I am not sure whether it includes the general counsel's time or not.

The committee should understand that the court proceedings for enforcement of subpenas are conducted by our general counsel's office. The responsibility for the substantive investigation is that of the Bureau of Competition.

The case at present, as far as I and my staff are concerned, is in a dormant stage. The Commission has declined to issue the complaint that was recommended last summer. The court proceeding for enforcement of the subpenas has resulted in a determination by the D.C. circuit court upholding the district court in effect denying our right to obtain the basic reserve data that we want, at least to obtain tha data necessary in order to be able to establish that there was, in fact, underreporting.

A decision of the circuit court was rendered last August. My understanding is the general counsel filed a motion for reargument before the D.C. circuit court, that motion was granted about a month ago, and the reargument will take place next Monday.

At the present time there is nothing that my staff can do. We are not in a position to obtain hard reserve data from the companies. I have a single staff attorney on the case at this present time. I had two for a short while last summer. One of them was hired away by a congressional committee.

When we obtain the right, assuming that we get a favorable decision, and the court procedures have run their course, we will staff that case as it should be staffed and we will go and obtain that information and see if we can satisfy the Commission's concerns that were reflected in its decision last summer in declining to issue the complaints.

Mr. OTTINGER. If the decision is adverse, will you be making a recommendation to Congress for a change in the law? Is that the subject matter of the court, whether the statute as it presently exists permits you to obtain this information?

Mr. GARFIELD. The court decision—the general counsel really should at least correct me if I am wrong on this—the court decision is a rather complex one. What the court said was that we could obtain certain data as to actual reserves from the companies, but that we could not use that information to establish that there was, in fact, underreporting because we were estopped from doing so by a prior determination of the Federal Power Commission which accepted the data that had normally been furnished by the AGA to the Federal Power Commission as being adequate for the FPC purposes.

That is a technical discussion of the law of estoppel. If that remains the law, I will certainly be recommending that we at least consider the problems that that raises for a law enforcement agency where a determination by another agency may, in effect, stop us from pursuing our obligations to enforce the antitrust law.

Mr. MAGUIRE. May I proceed, Mr. Chairman?

Mr. OTTINGER. You may for a brief time. There are a number of matters to cover. I will observe the gentleman's 5 minutes are now 13 minutes.

Mr. MAGUIRE. Thank you.

May I ask you why you do not proceed to issue a complaint? Perhaps I should ask the chairman, or yourself, why you do not propose to the Commission that a complaint be issued based on what you already know about the difference in the reporting by the AGA and by the Geological Survey? A 37 percent difference has been uncovered there. It is perfectly apparent from the way in which the AGA gets its information, and we know how this occurs, through the subcommittee process with members serving on the subcommittee who are representatives of the interested companies and only have the interested companies reporting on the basis of ball-park figures and telephone conversations, rather than on the basis of access by the entire subcommittee to the raw data.

Clearly this is a flawed—that would be the minimum statement one could say about it—process, and it's probably much more than a flawed process; it is probably a process which radically distorts the calculations of reserves and, therefore, the determinations of prices which have to be made and the danger is the public is being drastically misled and prices are not being properly set.

If all that is true, as I believe it to be, based on what is now part of the public record and what has been available to you and to us and to the Federal Power Commission, why is not a complaint issued with the objective of setting some sort of a proper definition for what a proved reserve is or what a measured reserve is and how probable reserves, whether or not gas has actually been pumped out of there, should be included in the calculations.

Why don't we get on with it?

I would like the chairman to answer, and then perhaps Mr. Garfield.

Mr. COLLIER. First, we must reflect on what the obligations of the Federal Power Commission are in the initial instance to define a category which they are going to rely upon to set the rates pursuant to their statute.

They have been given the mandate to set a definition presumably based on the law and subject to judicial and congressional review.

As you were raising the question, it occurred to me that several concepts with regard to the term "reserve" were embodied in the question. As a personal matter, I am not familiar with some of the technical features. Perhaps Mr. Garfield at this point can comment upon that issue, which is the question of defining reserves and the information we have with respect to various definitions of that term.

Mr. GARFIELD. I can't comment in any technical detail, but I know that one of the problems that we have faced in the natural gas area—and this is true elsewhere where we are talking basically about reserves—is that no two companies keep their data on the same basis.

Mr. MAGUIRE. That in itself is outrageous. Why should not the FTC insist the records be kept on the basis of some common standard so we know what we are talking about?

Mr. GARFIELD. I don't think it is a question of writing it like a trade regulation rule. There are immensely complicated factors, such as how much moisture there is in the gas. I am not in position to comment in detail on it. There are engineering definitions of what is a proven reserve that will vary from engineer to engineer.

In general I think the point is that until we obtain actual company data and can compare that with what is reported by the AGA——

Mr. MAGUIRE. That has been done. USGS has done that. You have a basis on the basis of their work, plus the AGA published figures. The paucity of the AGA's definition—I understand it is a couple of sentences long. There is a basis for a complaint here.

Mr. GARFIELD. The full staff memoranda, everything that went to the Commission, is in the hands of the subcommittee. If I can say this without implying criticism of the Commission, I am faced with a determination by the Commission that, no, we do not wish to issue a complaint on the basis of the material you have shown us.

There isn't any question in my mind that the AGA situation is flawed and it will inevitably result in underreporting. I would be willing to recommend the Commission issue a complaint based on what we stated in July, but the situation—in light of the Commission action—is difficult for me.

Mr. COLLIER. I would like to ask whether Commissioner Nye, who was present for the deliberations, might respond to the question you raise?

Mr. NYE. I think there is a simple answer to your inquiry. In your discourse I heard a lot of "probablys" and "I believes" and those "probablys" and "I believes" may, in fact, be the case. It is a hard job to turn "probablys" and "I believes" into a win verdict before the administrative law judge, one the Commission can uphold and confirm and one that will hold up on appeal.

Before you can get there, you have to have the facts. The problem in this case is we didn't have the facts or documents that were necessary when this case was brought into investigation.

Chairman Engman and I and all the other commissioners said, "Let's get all those documents being withheld." They are not withheld for reasons other than they probably contain information, and, when we get them, we will complete the case.

We get criticized because we have a complaint we can't prove and it stays on the books for 5 years.

Mr. MAGUIRE. If I may comment, since the gentleman made remarks I have to respond to, if you would read your own staff reports and look at the data available publicly and in your own files, I don't think you would give such a fatuous answer.

Mr. OTTINGER. The time of the gentleman has expired.

I turn over the questioning at the present time to counsel.

EXXON LITIGATION

Mr. ROSENBERG. I would like to return briefly to the Exxon litigation we were discussing earlier.

Mr. Chairman, you had stated, and I believe Mr. Johnson stated also that the Commission has given us some documentation on the amount of resources that have been utilized in the *Exxon* case. I would like to ask the subcommittee's permission to introduce as part of the record these particular documents which were prepared by the Commission and which detail by time period the amount of resources allocated to the *Exxon* case.

We have also asked the Commission for, and they have given us, information relating to the turnover of attorneys who were assigned to the *Exxon* case.

Mr. OTTINGER. Without objection, those documents will be included in the record.

[The documents referred to follow:]

APPROXIMATE NUMBER OF FTC ATTORNEYS (INCLUDING LAW CLERKS AND THE SUPERVISING ASSISTANT DIRECTOR) ASSIGNED EITHER FULL-TIME OR PART-TIME TO EXXON ET AL., DOCKET NO. 8934

Dec. 31, 1975, through Mar. 1, 1976	17
Dec. 8 to 30, 1975	16
Sept. 16 through Dec. 7, 1975	18
Sept. 4 to 15, 1975	19
Aug. 18 through Sept. 3, 1975	10
Aug. 1 to 17, 1975	11
July 14 to 31, 1975	12
July 7 to 13, 1975	14
June 5 to 6, 1975	16
May 3 to 4, 1975	15
Apr. 11 through May 29, 1975	16
Feb. 18 through April 10, 1975	17
Oct. 18, 1974, through Feb. 17, 1975	18
Aug. 26 through Oct. 17, 1974	19
Apr. 17 through Aug. 25, 1974	15
Apr. 9 to 16, 1974	15
Mar. 8 through Apr. 8, 1974	14
Mar. 4 to 7, 1974	18
Jan. 10 through Mar. 3, 1974	19
Jan. 3 to 9, 1974	18
Nov. 30, 1973, through Jan. 2, 1974	20
Nov. 9 to 29, 1973	12
Sept. 5 through Nov. 8, 1973	14
Aug. 24 through Sept. 4, 1973	13
July 18 through Aug. 23, 1973	10

APPROXIMATE NUMBER OF FTC RESEARCH ANALYSTS ASSIGNED EITHER FULL-TIME OR PART-TIME TO EXXON, ET AL., DOCKET NO. 8934

February 1976, through March 1, 1976	8
December 1975, through January 1976	8
October 1975, through November 1975	6
August 1975, through September 1975	4
June 1975	6
February 1975, through May 1975	7
January 1975	8
October 1974, through December 1974	9
September 1974	8
August 1974	9
July 1974	10
May 1974, through June 1974	11
April 1974	10
March 1974	10
February 1974	8
November 1973, through January 1974	5
October 1973	3
July 1973, through September 1973	0

FEDERAL TRADE COMMISSION—PETROLEUM INDUSTRY LITIGATION—EXXON, ET AL. CASE, FISCAL 1975 (PLAN VERSUS ACTUAL)

Man-years	Plan	Actual
Attorney/economist	21	17
Other professional	17	13
Clerical [1]	10	10
Total	48	40

[1] Clerical man-years are strictly estimates based on professional time expended on the program.

APPROXIMATE STATISTICS ON THE "TURNOVER" OF FTC ATTORNEYS AND RESEARCH ANALYSTS ASSIGNED EITHER FULL-TIME OR PART-TIME TO EXXON CORP., ET AL., DOCKET NO. 8934

(Calculations made as of March 1, 1976, unless otherwise noted. Figures for attorneys include law clerks, but exclude the supervising Assistant Director.)

1. Since the filing of the complaint on July 18, 1973, 40 attorneys and 18 research analysts have been assigned to work part or all of their time on the *Exxon* case. Of the original attorney staff, only one attorney remains on the case, although four others are still in the Bureau of Competition working on other matters.

2. For the persons who have been assigned to work on the case at one time or another since the complaint, the average period of involvement (either full- or part-time) has been 13.5 months for attorneys and 11.5 months for research analysts. For the persons presently assigned to the case, the average period of involvement (either full- or part-time) has been 12 months for attorneys and 11.5 months for research analysts. (These calculations were made as of February 25, 1976.)

3. The following shows the number of months spent on the case either full-time or part-time by:

(*a*) Persons assigned to the case at any time since the complaint was filed:

	Attorneys	Research analysts
Months:		
1 to 5	9	8
6 to 11	11	2
12 to 17	6	2
18 to 23	8	3
24 to 29	4	3
30	2	0
Total	40	18

(*b*) Persons presently assigned to the case:

	Attorneys	Research analysts
Months:		
1 to 5	5	6
6 to 11	6	0
12 to 17	1	0
18 to 23	3	1
24 to 29	0	0
30	2	1
Total	17	8

OPCS 1

PROGRAM STATUS *

Time Period: 1st Half FY76

Program Name: Petroleum Industry Litigation

Program Number: AA

Organization: Bureaus of Competition and Economics

Responsibility: Taylor

Planned Resources: Percentage Used 66 %

Planned Accomplishments: Percentage Attained * 100 %

*Bureau/Office estimate

FY 76 Planned Accomplishments:

Intensive trial preparation work is expected to continue with no visible commencement of trial late in the year, although trial is more likely to begin in fiscal 1977.

Year to Date Actual Accomplishments

-- Completed first wave discovery involving interviews or depositions with fifty officers and employees of respondent oil companies; second-wave subpoenas duces tecum will be presented to the Administrative Law Judge for issuance in January 1976.

-- Document processing activities initiated and refined by Litigation Support Division.

Reason for Variance

Intensive pretrial motion activity has delayed possible trial until 1978 at the earliest. Some resources were diverted to other energy-related activity, such as the Report on Petroleum Price Decontrol, requested by members of Congress.

	PERSONNEL					OPERATING EXPENSES				
	Attorney/ Economist	Other Professional	Clerical	Total		Travel	Program Contracts	Other Expenses	Total	Program Total
	Manyears	Manyears	Manyears	Manyears	Dollars	Dollars	Dollars	Dollars	Dollars	Dollars
Planned (Year-to-Date)	10.0	7	5.5 *	22.5	384	44	565	64	673	1,057
Actual (Year-to-Date)	6.9	1.2	3.8 *	11.9	255	26	359	59	444	699

* estimated

*Source: FTC Program Budget Mid-Year Review, January 1976, Vol. 1, Operational Planning and Control Reports.

OPES-2

Program Evaluation

Program Name: Petroleum Industry Litigation
Program Number: AA
Time Period: 1st Half FY 76

Activity Summary

	Preliminary Investigations			Formal Investigations			Consent Orders Issued	Part III Complaints Issued	Part III Orders Issued	Part III Matters Pending	Projects Pending	Rules Pending
	Pending End of Period	Opened During Period	Closed Recommending Formal Invest	Pending End of Period	Opened During Period	Closed Recommending Complaint						
FY 75	-	-	-	-	-	-	-	-	-	1	-	-
1st Half FY 76	-	-	-	-	-	-	-	-	-	1	-	-

Summary of OPPE Evaluation and Recommendations

In litigation.

Resource Allocation (Manyears)

	Bureau Planned	Remaining From First Half Fiscal Year	Total Available For Period	OPPE Recommendation	Difference
2nd Half FY 76	22.5	8.9	31.4		
FY 77	43.0				

Mr. Rosenberg. One sheet is headed "Turnover of FTC Attorneys and Research Analysis Assigned Either Full-time of Part-time to the Exxon Case."

Among the 40 attorneys assigned to this case only 1 remained in July of 1973 when the complaint was issued; 17 attorneys are currently assigned to the case; 11 have been assigned less than 1 year.

Do you believe turnover has been a problem in this particular case?

Mr. Collier. I don't know if it is a problem in this particular case, but turnover in a case with complex facts is a problem as a general matter. Mr. Johnson could comment on steps being taken to either discourage turnover or encourage people to stay with the litigation.

One of those he described to me, for example, would encourage people assigned to a case that is likely to be long and complex, that they have an opportunity during the course of their work on that case to work on some other matters for variety's sake, for the sake of broadening their exposure and for the sake of not sitting in a closet simply going through documents, which I think many attorneys resent and young attorneys don't believe that advances their career or understanding of the law.

Steps like that of a management nature are terribly important. I think to a great extent that in large cases that recognition did not pervade management within the bureau at one time. I think they are acutely aware of that now, in part I would assume by virtue of the experience with regard to this litigation.

Whether turnover has affected this matter, Mr. Johnson should comment.

Mr. Johnson. I think turnover is a problem, and we have addressed that problem in the last few months. The morale problem that we have on a big case is no different than the morale problem that the

respondents and their law firms would encounter; it is true in any large case, antitrust or otherwise.

Our solution to that problem is to try to give some diversity of work to the staff that are assigned to the *Exxon* case. In the last few months we have gone out of our way to create other jobs so they will not be working exclusively on Exxon.

I am told by the Assistant Director in charge of Exxon that their morale is good, particularly since the filing of their 1,600-plus page subpena last month.

Mr. ROSENBERG. The Exxon trial staff has filed the request for a subpena of documents and these documents could number in the millions or tens of million. It has been suggested when and if these are produced by respondents, it would take a much larger staff to review those documents. If this happens, would you request from Congress an appropriation for this matter only?

Mr. COLLIER. We have done that. We have identified the resource needs of this matter for Congress. I see no reason why, if we were able to identify the resource needs of a particular matter, we wouldn't do the same thing in the future. I think that is appropriate for congressional review of our activities.

Mr. OTTINGER. In this connection, have you set targets or timetables, for the completion of this case?

Mr. COLLIER. I do not believe the Commission has issued any orders setting timetables. The matter at this point from the standpoint of control of timetables is with the administrative law judge.

Mr. OTTINGER. We have a situation where this thing has been going on for 3 years and you don't even have any documents yet.

Mr. COLLIER. I am not sure what we have.

Mr. JOHNSON. We did conduct a precomplaint investigation. It is true, since the filing of the complaint, we have been engaged largely in a motions practice which has been quite successful. Most of it has been decided in favor of the Commission.

We now anticipate, with the enforcement of our subpena, we will have hundreds of thousands, perhaps millions, of documents coming in.

Mr. OTTINGER. What I am trying to get at is that I would like to see some kind of effort made to give a time perspective to this. I understand there are a lot of things beyond your control, but it seems to me we should have some idea of whether we are talking about 3 more years, 10 more years, or even 20 more years or just getting this case at least through the administrative process.

Mr. JOHNSON. I really don't have an answer to the time question. I suppose one could look at the history of major antitrust cases and make some deductions therefrom. The *Exxon* case will be larger because of its theory, based upon the interaction of eight companies. It will involve a lot of documentation on joint ventures, exchange agreements, and that sort of thing. We have to show how these eight companies relate to each other.

Reference was made here today to the *IBM* case, where the complaint was issued in 1969 and the case is now at trial in 1976. You can look at these historical parallels and hope they are somewhat comparable, but the administrative law judge will control the progress of discovery in the *Exxon* case. A lot of the timing is subject to his orders,

subject to the respondents' reaction, and subject, quite probably, to court enforcement on certain aspects of our discovery. So we really can't come up with a figure.

Mr. Ottinger. It seems to me the Commission at least ought to chart, on the basis of what you anticipate may happen, the resources you are going to need, the kind of time frame that you are shooting at, even though that may be derailed along the way.

Mr. Collier. There are four possibilities for setting timetables in the litigation. There is the possibility that either party, complaint counsel on the one hand, respondents on the other, could apply to the administrative law judge to establish timetables.

There is the possibility that the administrative law judge on his own motion could establish a time frame. Finally, there is a possibility the Commission on its own motion could establish time frames with regard to a particular matter.

The establishment of time frames in any piece of litigation requires a rather thorough knowledge of the particular facts and the particular stage of the matter. I would expect in a matter of this kind that the initiative in the first instance would be invoked by the parties, in particular, complaint counsel, and similiarly law judges should they believe a timetable is necessary to move the matter expeditiously.

It is conceivable the Commission could become familiar with the matter through the exposure of the interlocutory appeal process over time to identify appropriate timetables. But at this point, it is my impression that the Commission does not have the factual basis for acting in that manner. Presumably the administrative law judge will have that factual basis as this matter proceeds.

Mr. Ottinger. You have taken on probably the biggest undertaking that exists in the antitrust field, so we have to recognize that.

At the same time I think in a real way this is a test to see whether this process can work with respect to antitrust litigation, and I think allowing it to languish anymore than is necessary is going to impair the confidence of the public as to the ability to achieve rules through this process.

I would hope that at some stage you would seriously consider the setting of at least the time targets.

Mr. Collier. It would be a great disappointment to an administrative agency set up for the purpose of resolving matters, if we didn't come to grips with this problem, to the extent it became generic to matters resolved through the adjudicative process.

I think as a broad policy question that question is entirely appropriate and one I think we have to look at as a broad policy question with regard to adjudication. I like to think we are looking at the question but whether we have been imaginative enough in the scrutiny of our own procedures is a question we have to constantly ask ourselves. I don't come here this morning with all the answers.

Mr. Rosenberg. Chairman Collier, the Commission has supplied to the subcommittee staff a listing of all of the motions filed in the *Exxon* case, and the document here is 53 pages long. We have counted the number of respondents' procedural motions which have been submitted to the ALJ and to the Commission, and they number somewhat over 100.

This seems to indicate that the respondents in the case have every intention of fully litigating the procedural points. These points were raised previous to any issue regarding the submission of substantive documents. These motions were filed during depositions of company employees with regard to recordkeeping and nonsubstantive matters and this indicates that there may be intensive opposition to the recent subpena request for substantive documents.

It has been suggested that such intensive opposition could prevent the Commission from obtaining the documents which are requested in the subpena for 2 or 3 years even if the Commission were to win all the litigation that is naturally going to be conducted. If this were to happen, where it became clear that the Commission was not able to proceed to even begin to look at the documents in a time period of 3 or 4 years. do you believe the Commission should so inform those in Congress who are waiting for resolution of the important issues involved?

Mr. Collier. It is terribly important that Congress be advised of this kind of matter. For example, the Commission has welcomed the free interchange between this committee and its staff members and counsel who are working on the matter to keep the committee, and through the committee the Congress, advised of how the matter is progressing.

That interchange that is appropriate with respect to your general oversight and it seems to me it is entirely appropriate in every other respect, and I would expect that to continue.

Whether or not the Commission in some official manner would advise the Congress apart from the oversight and appropriations process I don't know. But I have no doubt in cases that consume a lot of resources and have the attention of Congress, that that exchange will occur regularly and over the course of time.

I do expect Congress will ever be unaware that a particular matter is not suited to the authority that Congress has conferred on us.

Mr. Rosenberg. I would like to ask if any other Commissioners have comments?

Mr. Dixon. We keep Congress advised with our reports. I don't know if anybody reads them. Sometimes we have been derelict in getting them up here on time.

Mr. Ottinger. Let me assure the Commission they are read.

Mr. Dixon. I hope so. You would have to do a whole lot of reading with all the stuff that comes up here.

Mr. Ottinger. We have very helpful staff. As you can tell from the followup work the committees have done, they are read and we are concerned with the work in progress by the Commission.

Mr. Dixon. I wonder how I have stayed around this process so long. You can imagine how many times I have walked to the window and thought about the frustrations of the Agency. It would be a heck of a lot worse if we weren't trying, and that is what saved me, that is all.

You are asking us to give you a prediction as to when we will reach the end of this process. Maybe when the American Bar Association decides to put it on the table and not take advantage of everything a lawyer can do—we call that due process in this country, and, by George, I don't want to live in one that doesn't guarantee that. It's

expensive, you bet this kind of lawsuit is expensive. The question is how strongly will the Congress remain behind an agency trying this case.

It may take 10 years. None of us will be here when we finish this case.

We are talking about this case being complicated. This isn't as complicated as the *Cement* case. But the Attorney General in that case when Congress got on him, said he thought an administrative law judge was better suited to try it. They dumped it on the Commission in the early thirties, and it was decided, I think in 1946 or 1947.

It happened that men who came to the Commission then didn't leave because they didn't have anyplace else to go.

Mr. OTTINGER. It's as proper for you to be frustrated as us, Mr. Commissioner.

Mr. Collins.

Mr. COLLINS. I have been impressed with many comments Mr. Dixon has made. About frustration, if you think you have been frustrated being a Commissioner on FTC, you ought to know how it is to be a Republican Congressman in this Congress.

You said one thing that I really was glad that went into the record, because I think it is part of the system on which we built this Government. We have three branches of Government, Executive, Judicial, and Legislative. We have judges in this country that believe they can make the law. That isn't their function; they are supposed to decide the law.

I was glad you made it clear that the function of the FTC is to act as an independent body and present the facts, that you are not a court of law. I was glad you emphasized you believe in the judicial due process of law. We have many people in this country that would try to expedite and find a way to go around due process and in that way we wouldn't have fair equity to the country.

I want to go back to some interesting things about this case we are discussing. We talked a lot about AGA and gas. I don't know to what extent you have authority over it, but the AGA is an independent group of people that consume gas. These are not producers. They have no reason to understate or overstate the figures. It's to their advantage to know what the true facts are.

AGA INVESTIGATION

This AGA, this independent group, doesn't always come up with exactly the equitable, or what might be, and they have differences. We have asked the reason why they have differences on determining what reserves are Anybody that is familiar with this business knows that when you start looking 20,000 feet under the ground and trying to estimate what is down there, you can't make a definite decision. There are a lot of factors involved. The amount of sand, the depth of the payload is one fateor, the type of material it's in, you know, if it is in stone. You all are familiar—it's a science, and they have improved it a lot. I am sorry the gentleman isn't here from New Jersey.

Mr. OTTINGER. I will take up his cause, Mr. Collins.

Mr. COLLINS. We sat in on a hearing here on Monday and the entire hearing was based on the fact that Gulf Oil had overestimated their

gas reserve. I am talking of the Delta field in Louisiana, and we were irate at the fact that they had made a commitment for producing gas, which my counsel points out is the West Delta 27 field.

When they brought it in, they thought they had a tremendous amount of gas. They made a contract accordingly. After they produced—they brought it in in 1964. After producing 2 years, they found they didn't have nearly the gas they thought. They were reluctant to decrease the estimates, and it was 1969 before they got back to it.

We got critical because he overestimated, and then we are critical if he underestimates. I don't think whether they are under or over will solve the gas shortage in this country today.

Mr. Ottinger. If the gentleman will yield, I think our concern is to get the most accurate figures possible based on estimation of the reserves, as I understand it.

The thing which has most upset those of us who have been critical is the companies that have apparently been keeping two sets of books.

They have been furnishing one set of information to the AGA, while their books, when we were finally able to get them, as I understand we did in the case of Gulf, didn't show the same thing reported to the AGA.

I assume the gentleman is as concerned about that as we are.

Mr. Collins. Their books were a responsibility for a tax basis and a responsibility to the stockholders. I want to tell you one interesting thing. We are asking you for those figures, and yet we have them down in the warehouse. We have had them since July of last year. We have been sitting with all these figures. We have a great big staff here, yet we ask you what conclusions come out of them. Since July, for nearly 1 year, we have had a warehouse full of all this junk and haven't come to any conclusions ourselves.

Mr. Dixon. Why don't you make it available to us and we can quit fighting so much.

Mr. Collins. I think the Commissioner asked a fair question. I don't see why we should be asking any Federal Trade Commissioner or any other bureau of the Government what the data is in this case that in any way is in conflict to the best interests of the United States when we haven't analyzed it ourselves.

Mr. Dixon. I was on the Commission when the request came down that we institute this investigation or this study and report. I was uncomfortable, and I didn't like it. I so indicated by my attitude on the record when we got the report, because I thought that we were being asked really to oversee another so-called regulatory agency. Federal Power has the authority to get this; it's not our job—it's theirs.

Mr. Collins. Federal Power and AGA.

Mr. Dixon. We had a duly authorized committee of the Judiciary Committee of the Senate ask us to do this. Usually when it comes that directly from a standing committee, it's virtually a command to us. It isn't a request. It's kind of like being in the military when a higher officer in the Navy requested you to do something, that was an order; you didn't ask if he was serious or not.

We started there and finally came to a point at which staff said that they thought they had enough for a case, and we sat at the table and we talked about it.

We decided, I think unanimously at the time, that it would be far more in the public interest to stand by until we got all the information. We had some volunteers in this—how many volunteers did we get? Four out of eleven.

Now the staff came up and said that is enough. I am from Tennessee. It's an indication, but I would like to know what those other seven have that they didn't let us see.

Mr. OTTINGER. Just for the record, I would like to say I am informed that we will be publishing and releasing shortly the documents which have been obtained by the committee. Those will be available, but we wanted to have a chance to take a look at them.

[The following letter was received for the record:]

CONGRESS OF THE UNITED STATES,
HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS,
OF THE COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE,
Washington, D.C., May 11, 1976.

Hon. JOHN E. MOSS,
Chairman, Subcommittee on Oversight and Investigations, Committee on Interstate and Foreign Commerce, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: I am returning herewith a corrected copy of the transcript of the Subcommittee hearing on the Federal Trade Commission held on April 14, 1976. At page 2–56, the following comment appears by me:

"Mr. Ottinger. Just for the record, I would like to say I am informed that we will be publishing and releasing shortly the documents which have been obtained by the committee. Those will be available, but we wanted to have a chance to take a look at them."

The comment was made on the basis of a misunderstanding based on staff information furnished to me. My statement should be corrected to read as follows:

"Mr. Ottinger. Just for the record, I would like to say I am informed that we will be publishing and releasing shortly *a report based on* the documents which have been obtained by the committee." (Correction in italic.)

Clearly, any decision on release of the documents or their contents would not be affected by this comment and would be a matter for the Subcommittee to decide under the Rules of the House of Representatives.

I would appreciate having a copy of this letter included in the transcript of the hearing.

Sincerely,

RICHARD L. OTTINGER,
Member, Oversight and Investigations Subcommittee.

Mr. COLLINS. Perhaps when they are published you can evaluate them and give us the benefit of your experience.

WOMEN'S ISSUES

Another subject, since we don't get to talk to FTC often, I will ask Commissioner Dole. I think it has become the practice to assume a woman understands the consumers' viewpoint. Of course we are concerned very much to what extent business in this country is fairly or unfairly treating women as to development, marketing, pricing, or anything. You have been on the Commission how long?

Mrs. DOLE. Two and a half years.

Mr. COLLINS. What is your viewpoint as to what you and the FTC are doing to explore and develop the women's viewpoint and all consumers?

Mrs. DOLE. That is an interesting question. I am not sure we would segregate it in that way, Congressman Collins.

I think as far as the protection of any group of people, I might just go back to what I have said many times. In our determinations about what types of matters we should engage in the Commission has been urging a cost-benefit approach; in other words, we try to determine to the best of our ability what return we are going to get on the taxpayers' dollars that we spend.

As I have said a number of times, I think you have to look beyond just the quantification of this type of data, that there are other elements that have to be considered as well. For example, a particularly vulnerable group, the elderly, or those who are uneducated or otherwise unable to protect themselves in the modern market.

You may not be able to quantify the dollars you are going to return on the money spent in instances like that, but cases involving those factors should, in my opinion, be considered very seriously by the Commission.

Another example—The deterrent effect of the Commission's orders is not quantifiable, but the Commission must maintain the integrity of the law and the Commission's credibility, particularly where there is a violation that has high visibility. It may not produce the kind of return we are talking about in cost-benefit terms, but it may be very important to the Commission's credibility and its enforcement efforts.

There are other factors of that sort, including health and safety matters.

You mention women. The area of cosmetics is one that would be particularly interesting to women and that sort of case is among our various endeavors.

Mr. Collins. What would you do in cosmetics?

Mrs. Dole. The Commission has had various cases in the area of cosmetic advertising, for example. We are responsible for overseeing advertising, to determine whether there may be unfair or deceptive advertising taking place in this particular area as well as others.

Mr. Collins. To what extent in advertising, this is something you go back and, I guess, place the responsibility completely on them to prove all factual basis for any statement they make; is that right?

Mrs. Dole. If a claim is made for a particular product, we want to know if a reasonable basis exists for the claim. In other words, does the advertiser have a reasonable basis for the claim made in the advertising.

Mr. Collins. What field of advertising has concerned you all the most?

Mrs. Dole. This would cut across the board——

Mr. Collins. Is it the media or the product?

Mrs. Dole. Of course, today you have the impact of advertising in television. This is something that has developed over recent years, and I might just mention one particular rule, or rule proceeding, which the Commission initiated just recently in the area of over-the-counter antacids—whether or not certain warnings should be provided in advertising as well as on the labels of the products.

Our authority is across the board, drugs, cosmetics, food, medical devices, all areas, any product. In this particular area the Food and Drug Administration—in 1974, I believe—published a study which indicated that 43 percent of those surveyed looked to advertising pri-

marily for their information about over-the-counter drug products whereas only 13 percent of those surveyed looked to the labeling for the information they obtained about over-the-counter drugs.

So the Commission is engaged in a rulemaking proceeding to determine whether or not it might be wise to require certain advertisers to carry warnings in their advertisements when the Food and Drug Administration has determined that they should be carried on the labels.

Mr. COLLINS. All these, do all these warnings we see on labels, does that come from you?

Mrs. Dole. Food and Drug Administration. We have the advertising.

Mr. COLLIER. We have the advertising section.

Mr. DIXON. Warning on cigarettes, the warning there, we are the only agency that could deal with it. It was not a drug, it was not food, so Food and Drug could not do anything about it.

Mr. COLLINS. You are relatively new to the Commission, Mr. Chairman——

Mr. COLLIER. This is a return engagement.

Mr. COLLINS. As counsel but not Chairman?

Mr. COLLIER. Yes, sir.

RESOURCE ALLOCATION

Mr. COLLINS. How do you decide what priority you give to the different items on your agenda? What do you decide you had better be working on? Do you try to do everything coming to your attention?

Mr. COLLIER. We have in the last couple of years attempted to make very conscious decisions about the allocation of our burdens, both for internal communications with the staff, and for the purpose of advising the Congress. We have gone to program budgeting, which allows Congress to look at the division of resources. We now have a very large budget with a description of all the programs for which we are requesting money, one by one. We try twice a year to have omnibus sessions in which we look at all the activities of the Commission to determine whether certain areas should be increased and emphasized, whether new areas should be the basis for effort, and whether there are areas where it looks as though we are overextended. We look at all the programs at once.

In addition, the Commission has tried over the years, and it is nothing new, but we do it in news ways all the time to make more rational the screening process for deciding what cases to bring. Because we receive thousands of complaints each year from consumers or self-initiated matters we try to make the screening that those complaints go through, as Commissioner Dole suggested, involve concepts of cost and consumer benefit. It is a continuing process.

Mr. COLLINS. Thank you, Mr. Chairman.

Mrs. DOLE. May I comment on that? I think another goal which the Commission should be working toward is to evaluate more of its orders. This is a difficult area. Since the Commission does have broad statutory authority, it has wide discretion in determining what remedies are reasonably related to alleged violations. Some of the remedies chosen have been rather innovative. We have a responsibility, as far

as we are able, to follow up and determine the effectiveness of our orders. This, of course, takes money, and it is also difficult.

In some cases it is not possible to get a firm grip, not possible again to quantify the results. But I think the area of evaluation is one that we will want to examine more closely and try, where possible, to determine the effects of the order. Has it been effective? Has it accomplished what the Commission hoped that it would? Is it an order that can be useful in other cases in the future? Is it appropriate for other areas? The Commission should do more of this in the future.

NEW AUTHORITY

Mr. OTTINGER. Following up on Mr. Collins' inquiry, there are three authorities which Congress gave to the Commission to protect consumers that have not been used at all or have been underutilized. I would like you to comment on each but I will describe each just briefly.

The first is new section 19(b) of the Federal Trade Commission Act which allows the court to grant redress to consumers such as rescission or reformation of contracts, refunds, damages or public notification as a part of a Commission and civil action.

It is my understanding no action has been brought in the district court under this section.

The second is financial support for unrepresented groups. Under section 18(h) of the Federal Trade Commission Act, the FTC is authorized to pay up to $1 million each fiscal year to persons who may not be able to participate in the rulemaking when participation is necessary to equitable rulemaking. Also, $500,000 was appropriated in fiscal year 1976 but only $88,984 has been authorized by the Federal Trade Commission. In this regard I have a specific question as well, whether the Commission had made a determination whether these funds may be made available in connection with a petition for rulemaking. This was a question given to us by the National Organization of Women which has been having difficulty getting a determination whether they would be eligible for this sort of help in connection with participation as opposed to the actual rulemaking process itself.

The third is civil penalty actions under the new section 15(m)(1)(a) of the Federal Trade Commission Act. The act provides that penalties may be up to $10,000 for each violation of this section. It is my understanding that no actions for civil penalties have been initiated by the Commission under this section.

Would you comment on those?

Mr. COLLIER. Another authority recently conferred by Congress is the authority to seek injunctions. The way this law is structured the predicate for redress matters is first the successful administrative adjudication of a case. In order to trigger the so-called "retroactivity" requirements of the statute the respondent must be notified the Commission may subsequently seek the redress.

There are administrative cases which lay the predicate for possible future judicial proceedings to obtain redress in approximately 20 cases which have currently been issued. Another avenue by which the Commission utilizes the redress authority is in the context of achieving settlements providing for consumer redress. That has been done.

Mr. Ottinger. With what frequency?

Mr. Collier. Within the past year there have been somewhere in the neighborhood of $2 million in settlements invoking consumer redress. And, as indicated, approximately 20 or so cases are presently in adjudication that may subsequently lead to redress actions.

With regard to the authority to provide representation, particularly unrepresented groups contained in that bill, I am disappointed personally since I tried to assist the Congress in development of that legislation and I would like to see that program developed as a model on which Congress might at some future time build to provide for the kind of representation that I think we all feel is difficult to generate in a proceeding.

We have, as you indicated, consumed about one-fifth of the appropriated amount for this year up to this point. There are a couple of reasons that may be working here as to why that number is so disappointingly small.

First, the delay that was built in—as we discussed at the last session—with regard to getting some of the new rulemaking proceedings on the track and moving, slowed down the number of applications to participate in those proceedings.

Second, I think there is just a general lack of familiarity that the provisions exist. This may be a problem on our part of getting the word out. I think we are making progress. The Commission was concerned at first with overselling, of just having a long line waiting out there and disappointing too many people. Now, I think we may have been too cautious in the other direction.

Mr. Ottinger. Can you give us any idea how much assistance has been applied for under this section?

Mr. Collier. I believe somewhere in the neighborhood of $400,000 total has been applied for. But many of the people who applied didn't get everything they asked for. It was reported to me, for example, that some people were applying for hourly billing rates in excess of those a government employee would get.

Second, some of the petitions, in the judgment of the people administering the program, didn't meet the statutory criteria which you articulated a minute ago. I believe it is terribly important that the Commission try its hardest to make that statute work in order to give guidance to Congress as to what to do with that nagging problem about people not being able to effectively participate in working with the Government.

Mr. Ottinger. I am enthusiastic about this kind of vehicle for getting citizen participation in regulatory decisions and departmental decisions of the Government.

One of the things we are seeing is a feeling of frustration on the part of the public. They don't have any say in what goes on and there is a lack of confidence that they can influence events. I think this is a vehicle where that can be facilitated and interest can be fostered if this is promoted by the Commission.

Can you answer the specific question about whether the person who is in the process of petitioning for rulemaking is eligible for this funding?

Mr. Collier. In the first place, it is a question that turns on both the statute—which I have not studied in the context of that particular

petition—and the implementing rules with regard to eligibility. Beyond that there may be questions of policy the Commission may or may not have dealt with.

Ms. Bernstein, who as Acting Director in the Bureau, administers that program may have given thought to this question of eligibility of petitioners and I would like her to comment on that.

Mr. Ottinger. Will you stand and be sworn?

Do you promise the testimony you are about to give is the truth, the whole truth and nothing but the truth, so help you God?

Ms. Bernstein. I do.

Mr. Ottinger. Please give your name for the record.

Ms. Bernstein. Joan Bernstein.

I think the question you ask, Mr. Congresman, is a case of first impression for us, it has not been raised before, probably because a petition to initiate rulemaking is a simple sort of procedure, as we interpret it. A letter with some factual information will be interpreted as a petition and we will make a determination.

I see no apparent reason why the compensation money might not be applicable, assuming it meets the statutory criteria that they could not be represented and could afford to.

Mr. Ottinger. Can we get an answer for the record as to whether there are any legal problems with this?

Mr. Collier. We would like, I am sure, to put our hands on that petition, which I personally have not seen.

Ms. Bernstein. I checked on it yesterday and it had not been received, I don't think.

Mr. Ottinger. It was from the legislative director from a national women's organization.

Mr. Collins. What is that particular one we are asking about?

Mr. Ottinger. It is a communication from the legislative director of the National Organization of Women, which has been unable to get an answer as to whether it would be eligible for assistance under section 18(h) of the Federal Trade Commission Act providing financial support for unrepresented groups in connection with the petition; that is, under the Magnuson-Moss Act, whether or not they would be eligible in the petitioning process for assistance or whether the assistance is only available after a petition has been granted in the course of the rulemaking process.

Mr. Collier. We will be happy to respond to that.

[The following statement was received for the record:]

Additional Views of Joan Z. Bernstein, Acting Director, Bureau of Consumer Protection on Compensation for Rulemaking Petitions

A representative of the National Organization for Women has inquired whether compensation can be paid under Section 18(h) of the FTC Act, as amended, for a petition for the initiation of a rulemaking proceeding, or whether Section 18(h) is confined to the costs of participating in a rulemaking proceeding that has already been commenced.

The question was posed to a staff member of the Bureau of Consumer Protection by telephone early in April, who told the NOW representative that he felt there was a substantial statutory question that cast doubt on the availability of compensation. The NOW representative has not, however, followed her initial telephone inquiry with a petition coupled with a request for compensation, or even a letter asking for an official statement of the views of the Bureau of Con-

sumer Protection or the Commission. The question must therefore be answered in the abstract.

Section 18(h) makes no specific provision for compensating a petitioner's costs. The language of the statute and of the Conference Report dealing with that section of the Magnuson-Moss Warranty-FTC Improvement Act appears to contemplate that compensation will only be available for participation in a rulemaking proceeding that is already underway. Section 18(h) authorizes compensation for "reasonable attorneys fees, expert witness fees, and other costs of participating in a rulemaking proceeding under this section." Section 18(h) also limits compensation to persons who "cannot afford to pay costs of making oral presentations, conducting cross-examination, and making rebuttal submissions in such proceeding." The use of the words "rulemaking proceeding" implies that Congress intended the statute to apply only to a proceeding already in existence. Moreover, the definition of financial inability to participate is given in terms of oral presentations, cross-examination and rebuttal, all functions that could only be performed in the course of a rulemaking proceeding in progress.

The Commission adopted this interpretation of the statute in its rule on compensation. Rule 1.17(c) of the Commission's Rules of Practice provides, in pertinent part: An application for compensation for participation in a rulemaking proceeding may be filed at any time after the publication of the initial notice of proposed rulemaking. An application for compensation shall be filed prior to the time when the costs for which compensation is sought are incurred.

The rule requires that compensation applications be filed only after an initial notice has been published, and that only costs incurred after filing of the application can be compensated. The statute and rule would thus seem to preclude compensation for petition costs, since such costs would precede the initial notice and, for that reason, would also necessarily precede the filing of a compensation application.

Mr. Collier. A third area is civil penalties for knowing violation of the rules of law set out in prior Commission determinations. The Commission's approach to that, as I understand it has been to provide the kind of guidance to the business community that we think at this stage at least is an appropriate predicate for invoking this deterrent. With regard to this provision and with regard to the redress provisions and with regard to all of the law enforcement tools that the Congress has given us, our primary concern shall be to eliminate practices and not simply to be disappointed that there aren't any for us to chase after.

One of the terribly important aspects of all of those legislative authorities, and I would add to this the injunction authority, is what they prevent and not what we happen to catch. Although I think what we happen to catch, given our own experience, may be a good measure of our stewardship of those authorities. In the civil penalty area we have tried to provide notice to the business community of the areas we intend to focus on, so there can be no mistake in what the law means or what their obligations are, hoping in the final analysis that we won't ever have to use that authority. It is a severe authority.

One other dimension of the injunction area that has been very helpful to us, is in the context of approaching somebody who is engaged in a practice that is suspect on the one hand, with that injunction authority in your pocket and in approaching that fellow with nothing in your pocket but the prospect of 5 years litigation and a prospective cease and desist order that may operate thereafter. It does strengthen our hand in our overall responsibility to steward the statute. I think we have had instances where the existence of the injunction authority provides for the settlement on favorable terms of

problem areas. Again since the authorities are new the numbers are low. I think there is a lot in the pipeline that holds promise that in appropriate cases we will not hesitate to use any and all of those authorities.

Mr. OTTINGER. Are the figures I have accurate? There have been six cases brought under section 13(b) for an injunction?

Mr. COLLIER. That is probably about right, about six injunction cases and that would be in the last approximate 1½ years.

Mr. OTTINGER. I understand that Mr. McLain has a couple of questions, then we will adjourn the hearings.

Mr. MCLAIN. I would like to carry through with your line of questioning dealing with the Magnuson-Moss Act and its implementation by the Commission. Representatives of the Commission have stated previously that they are and intend to rely significantly on the promulgation of trade regulation rules in accomplishing its consumer protection mission as opposed to the case-by-case method.

In light of that I would note that as of January 1, 1976, 21.3 percent of the allocated staff members of the Bureau of Consumer Protection were devoted toward rulemaking. My question is, Mr. Chairman, is that substantial reliance to you?

Mr. COLLIER. I am not sure whether that 21.3 percent is a percentage of the total consumer protection mission, which would include the activities of the regional offices, which are not insubstantial if you calculate it in the base. The regional office activity has not been as extensive as the activities of the Bureau.

Perhaps we could get clarification from our executive director. That strikes me as a number that is a percentage total of the consumer protection mission which would lump in the regional offices. If you take that out, the percentage would be higher. It is my impression just from the sheer number and the activity level—some 19 trade regulation rules are now going forward under the Magnuson-Moss Act at this time covering a variety of practices in industry—that it could fairly be characterized as a substantial commitment of our resources.

Mr. MCLAIN. Could we explore a couple of program areas in the consumer protection mission you referred to to get to this mix between trade regulations rules and case by case. In the area of land sales, which consumed $520,000 in the first half of fiscal year 1976, at the end of that period there were pending 3 preliminary investigations, 23 formal investigations, 3 part III matters and also during that period, the first half of fiscal 1976, 3 preliminary investigations were opened and 4 formal investigations were opened.

Do you not believe that these matters to which this land sales program is directed could be better achieved by the promulgation of a trade regulation rule?

Mr. COLLIER. I think some of those cases involve situations where a rule which has a prospective effect just simply won't achieve everything Congress may have intended us to achieve with the redress authority, for example, in a situation where the law is neither mysterious nor unclear would it be unfair to invoke it in a particular case. This would occur if we only rely on putting out a new rule. I think that would simply be an instance of the Commission doing exclusively on a prospective basis that which Congress indicated in this legislation should not be restricted to only prospective efforts.

And I think that may account for the number of individual matters that happen to be pending in the land sales area in particular. Losses to consumers are not insignificant, the rules of law are not all that complex and individual cases may be the best way to remedy problems in that industry as well as to do individual justice.

Mr. McLain. Why do you think that the Office of Policy Planning and Evaluation recommended a moratorium on opening new cases in the land sales area?

Mr. Collier. They may have thoughts for alternative uses of the resources that they thought were promising. I don't know beyond that what their reasoning could have been.

Mr. McLain. Mr. Chairman, if we could, the Acting Director of that Office is in the audience, could he respond to that question?

Mr. Collier. Mr. Grady.

Mr. Ottinger. Mr. Grady, will you stand and be sworn.

Is the testimony you are about to give the truth, the whole truth and nothing but the truth, so help you God?

Mr. Grady. Yes.

Mr. Ottinger. Please state your name.

Mr. Grady. Mark F. Grady.

Mr. McLain. Mr. Grady, in your midyear review within the Bureau of Consumer Protection in the areas of both land sales and vocational schools, you noted that new cases had been opened during that period in lieu of the promulgation of a trade regulation rule and your recommendation based on this was for the Commission to declare a moratorium on opening any new cases in these two areas.

What is the basis for that recommendation?

Mr. Grady. The basis was very simple. We thought that many of these cases seek to redress harm that could have been prevented if the circumstances were merely disclosed to consumers prior to the time that they entered into the contract. To the extent that there could be a better disclosure which might be required by a rulemaking, then the occasion for litigation would be reduced.

As a consequence, our recommendation was that rulemaking be given priority even if it would require some present reduction in the number of cases.

Mr. Ottinger. Mr. McLain, I am afraid we are going to have to terminate this and allow you to submit additional questions for the record.

Mr. Collier. We will be delighted to supply answers.

Mr. Ottinger. We appreciate your forthright answers to our questions. We look forward to your continued vigorous prosecution of the authority which Congress has given to you and in which I think you have about as important an area of domestic responsibility as there is.

I want to wish you, Mr. Nye, in leaving the very best.

At this point the hearing will be adjourned.

[Whereupon, at 12:05 p.m., the hearing was adjourned.]

APPENDIX

[The following questions were submitted to the Federal Trade Commission:]

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS OF THE
COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE,
Washington, D.C., May 24, 1976.

Hon. CALVIN J. COLLIER,
Chairman, Federal Trade Commission,
Washington, D.C.

DEAR MR. COLLIER: In connection with the Subcommittee's recent oversight hearings on the Federal Trade Commission, we would like to submit the following questions, the answers to which may be made a part of the record of that hearing:

A. *Federal Court Litigation*

(1) What is the policy reason for not allowing Bureau attorneys to litigate cases in the Federal Courts?

(2) Has there been any recent examination of the effects of this policy?

(3) Have there been any indications that this policy has adversely affected the recruiting of experienced litigators or the morale of present Bureau attorneys?

B. *Consumer Problems Data Base*

(1) What areas or industries which the Commission is not now investigating have the most possible consumer protection problems?

(2) How does the FTC assemble a data base for determining what areas or industries not now being reviewed are most likely to have consumer protection problems?

(3) Has the FTC ever conducted a systematic survey of consumers to determine what consumer problems are most pervasive? If not, why not?

C. *Relationship With OMB*

(1) What is OMB's proper role with regard to the Commission?

(2) It has been suggested that regulatory agencies can never be truly independent if they must clear budgets and legislative proposals through OMB. Do you agree?

(3) Do you believe that regulatory agencies consciously or unconsciously submit lower budget figures than they really believe that they need simply because they know that higher figures would not pass OMB scrutiny?

(4) What effects do you believe direct submission to Congress of budgets and legislative proposals would have on the independence of regulatory agencies, as in the case with the Consumer Product Safety Commission?

D. *Use of Injunctions*

(1) The power to seek injunctions under Section 13(b) of the FTC Act has been attempted only 6 times since 1973 when it was enacted by Congress. Do you believe that the Federal courts have interpreted this power in a manner which is consistent with the Congressional intent?

(2) In *FTC* v. *Simeon Management Corp.*, both the Federal District Court and the 9th Circuit Court of Appeals appeared to interpret Section 13(b) as requiring a traditional equity standard for an injunction. Do you believe that this standard would make it difficult to use injunctions in many FTC matters?

(3) If the *Simeon* standard remains the interpretation of Section 13(b), would you intend to ask Congress for new statutory language to seek injunctions under a standard different from the traditional equity standard?

(4) Do you believe that injunctions would be useful in areas other than health and safety areas, for example, where the economic loss to consumers would be great and where the possibility of restitution later is small?

E. *Readability of Rules*

(1) It has been suggested that the Commission's regulations are too complicated to be understood by many consumers and that this lessens their impact. What is the Commission's policy with respect to readability?

(2) Has the Commission done any studies of older rules and guides to determine whether they are being understood by the public?

(3) Is there any procedure whereby rules and guides are reviewed for readability and updating?

F. *Line-of-Business Program*

(1) In light of the intense litigation concerning this program, when might the FTC expect to receive full compliance with the 1974 form?

(2) Is the time lag caused by this litigation a significant factor in judging the usefulness of the data once it is compiled?

G. *Designation of Issues for Cross-Examination Under Section 202(c)(1)(b) of the Magnuson-Moss Act*

(1) Does the broad scope of regulation 16 C.F.R. Section 1.13(d)(1)(ii) conform with the limited nature of the issues that Congress desired should be designated for cross-examination?

(2) What purpose does this regulation serve?

(3) Does the broad language of this regulation allow presiding officers to designate issues which are not subject to bona fide dispute?

(4) Does the varying approach to this question by the presiding officers in different rulemaking procedures indicate a lack of clear guidance from the regulations?

(5) Does the action of presiding officers such as in the Vocational School rulemaking proceeding indicate that the officers are bringing elements of adjudicatory procedure into rulemaking?

(6) Does Section 1.13(d)(1)(i) adequately describe the full range of issues which may be designated for cross-examination?

We would appreciate having the Commission's answers to these questions by Monday, June 7, 1976. Thank you for your cooperation in this most important study of federal regulatory agencies.

Sincerely,

JOHN E. MOSS,
Chairman, Oversight and Investigations Subcommittee.

[The following responses were received for the record:]

FEDERAL TRADE COMMISSION,
Washington, D.C., June 9, 1976.

Hon. JOHN E. MOSS,
Chairman, Subcommittee on Oversight and Investigations, Committee on Interstate and Foreign Commerce, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: In response to your letter of May 24, 1976, which poses several questions about Commission activities, the Commission is pleased to transmit the enclosed answers to your inquiries.

The Commission is grateful for your interest in the Commission and its work.

By direction of the Commission.

CALVIN J. COLLIER,
Chairman.

Enclosures.

A. Federal Court Litigation:

(1) What is the policy reason for not allowing Bureau attorneys to litigate cases in the Federal Courts?

Response: The Commission has vested in the General Counsel the function of representing the Commission in the Federal Courts. Although the Commission has determined to charge one employee with the overall responsibility for coordi-

nating federal court work that does not mean that Bureau and Regional Office attorneys are excluded from this process. In fact, the General Counsel seeks the advice and assistance of Bureau and Regional Office attorneys and attempts to involve them in individual cases consistent with the ultimate goal of representing the Commission in the most effective way possible.

In practice the General Counsel handles all litigation except civil penalty actions which are handled by a separate compliance division in each Bureau (under the control of the Department of Justice). Civil penalty cases usually deal with narrow questions of the interpretation of Commission orders and rarely involve issues that would affect the Commission's other court litigation. There are several interrelated reasons for having the General Counsel control litigation.

First, basic management principles suggest that accountability for an identifiable mission, such as Federal Court representation, be vested in one individual. Centralized control of litigation ensures that positions taken on behalf of the Commission before the courts are consistent with the Commission's own policies and with the positions taken on behalf of the Commission in other lawsuits. It can be readily understood, for example, that the Commission would not want to concede a point which might seem inconsequential in a particular lawsuit but which could adversely affect other Commission cases. The General Counsel, through his control of litigation, is best able to ensure that this will not happen either in briefs or oral arguments.

Second, it is critical to present to the court, the *Commission's* position, which may not always be identical with that advanced by a Bureau or Regional Office. The General Counsel as the Commission's legal advisor is best able to do this because of his noninvolvement in the prosecution of an administrative investigation or complaint.

Third, there are certain cases which, because of the prohibition of the APA against the commingling of adjudicative and prosecutorial duties, are most appropriately handled by the General Counsel. This would include all litigation for or against the Commission involving cases in adjudication before the agency. The prohibition against *ex parte* communication could raise problems under the APA if Bureau or Regional Office attorneys undertook to represent the Commission in such cases.

Finally, the absolute volume of Federal Court litigation is not excessive. By centralizing responsibility for this work, the Commission is able to accumulate important experience in a small staff of attorneys. This is particularly important because most Federal Trade Commission court litigation involves similar or recurring legal, policy, or factual issues. It must be remembered that Federal Court litigation is invariably collateral to the administrative process. Seldom do these cases involve detailed factual trials. For these reasons, the Commission believes that the highest overall quality of representation is achieved by centralizing court litigation authority.

(2) Has there been any recent examination of the effects of this policy?

Response: This long standing policy was last examined in December 1973, in conjunction with the expanded litigation authority conferred by Pub. L. 93–153. At that time, the Commission determined to vest in the General Counsel the duty to assure that the Commission speaks with one voice in the Federal Courts in implementing the new injunction authority. A copy of the Commission's minute is attached. Although there has been no formal Commission reexamination of the policy since that date the Commission remains aware of the issues involved in this matter.

(3) Have there been any indications that this policy has adversely affected the recruiting of experienced litigators or the morale of present Bureau attorneys?

Response: We are unaware of any indications that the policy has adversely affected the recruiting of experience litigators by the Commission.

The contention that this Commission policy adversely affects the morale of Bureau and Regional Office attorneys, although not insignificant, must be balanced against the considerations outlined in part (1) of this response. The Commission is not persuaded by the argument that the Federal Courts should be used as a training ground or that it should engage unnecessary risks of adverse court decisions and adverse judicial precedent. The Commission is convinced, however, that the talents, experience and expertise of all Commission attorneys should be used in the most effective manner possible and has directed the General Counsel to rely upon Bureau and Regional Office attorneys in appropriate cases and under appropriate supervision.

FOR CONFIDENTIAL STAFF USE ONLY

DECEMBER 4, 1975.

Memorandum for Executive Director, Assistant Executive Director for Regional Operations, Assistant Executive Director for Administration, Division of Budget and Finance, Office of Administrative Law Judges, General Counsel, Director, Bureau of Competition, Director, Bureau of Consumer Protection, Director, Bureau of Economics, Assistant to the Chairman, Office of Policy Planning and Evaluation, Legal Advisers to the Commissioners, Rules and Publications Section, Director of Public Information, Legal and Public Records: Federal Trade Commission Act—Amendments to Sections 5, 6, 13, and 16 (Public Law 93-153).

The Commission noted its approval of the direction of the Chairman, in memorandum of November 23, 1973, to the General Counsel, the Directors of the Bureaus of Competition and Consumer Protection, the Acting Director of Office of Policy Planning and Evaluation, and the Assistant Executive Director for Regional Operations, for the establishment of a task force under the direction of the General Counsel and consisting of members of the operating bureaus, regional offices, and OPPE to develop proposed guidelines for injunction cases for forwarding to the Commission by December 15, 1973.

The Commission vested in the General Counsel the duty to assure that the Commission speaks with one voice in the Federal courts under the new law in the matter of seeking and obtaining injunctions to bring a halt to unfair methods of competition or unfair or deceptive acts or practices, giving him the discretion to rely upon operating bureau or regional office attorneys to a greater or lesser extent if, in a particular case, he so desires.

The General Counsel was directed to make whatever recommendations he feels necessary so that the staff may be appropriately instructed in how they should handle cases which are likely to result in Federal court actions.

In addition, the General Counsel was instructed to review current arrangements for final orders of the Commission, subpoena enforcement matters, All Writs injunctions, and Sections 12 and 13 injunctions as to their adequacy; and, if necessary, to develop improved early warning systems and case preparation guidelines with respect to suits under the new injunction authority and civil penalty actions.

By direction of the Commission.

Chairman Engman's memorandum of November 28, 1973 is transmitted to General Counsel.

CHARLES A. TOBIN, *Secretary.*

B. CONSUMER PROBLEMS DATA BASE

B—(1) What areas or industries which the Commission is not now investigating have the most possible consumer protection problems?

Response: B—(1) The Commission is constantly on the alert for remediable consumer protection problems. As quickly as it is able to identify those problems, it addresses them. Accordingly, there is no backlog or inventory of problems of which the Commission is aware, which it feels it can solve, and which are not being addressed.

B-(2) How does the FTC assemble a data base for determining what areas or industries not now being reviewed are most likely to have consumer protection problems?

Response: B-(2) The Commission does not assemble what could be referred to as data base. However, problem areas are brought to our attention in a variety of ways: consumer complaints, petitions for rulemaking proceedings, referrals from Congress and Congressional Committees, referrals from other agencies, communications with public interests groups, internal economic studies, complaints from competitors, the advertising monitoring program, the advertising substantiation program, and review of relevant literature including periodicals and newspapers. All current and proposed program areas are carefully screened and reviewed to determine that the public interest would be served by their pursuit.

B-(3) Has the FTC ever conducted a systematic survey of consumers to determine what consumer problems are most pervasive? If not, why not?

Response: B–(3) The Commission considered conducting such a nationwide survey of consumer concerns, but it subsequently determined not to proceed with that effort for a number of reasons. First, the expense of such a broad-based survey, designed to measure both the nature and the extent of consumer protection problems, would be exceedingly large. Second, the staff was not convinced that, even if the funds for such a survey were available, the survey methodologies suggested were adequate to provide data beyond that already obtainable from existing data sources which tap evidence of consumer dissatisfaction, such as the Council of Better Business Bureaus and the National Commission on Consumer Finance.

C. RELATIONSHIP WITH OMB

C–(1) What is OMB's proper role with regard to the Commission?

Response: In the legislative area, OMB functions as a valuable federal agency clearinghouse. As virtually all legislative proposals and reports which pertain to a federal agency, whether originating in Congress or initiated by an agency, are of interest to more than one agency, OMB provides a valuable function in coordinating the solicitation and exchange of the views of all interested agencies. Thus, it affords the Commission the opportunity to comment upon legislaiton, or proposed legislative reports prepared by other agencies, dealing with matters in which the Commission has an interest. It is also helpful for the Commission to have a chance to consider relevant facts and opinions of other interested parts of the Federal government prior to submitting its views to Congress on a particular matter. It should be emphasized that any comments received from OMB as as result of the coordination process is considered to be advisory rather than mandatory.

In the budget area there are different considerations. Responsibility for the the national budget is shared by Congress and the President. Only Congress is authorized to appropriate funds. The President, on the other hand, has the power to approve or disapprove appropriation measures after passage by Congress and is also required by the "Budget and Accounting Act, 1921" to transmit to Congress a federal budget. In view of the latter responsibility, it is appropriate that OMB receive and review the Commission's budgetary recommedations. However, once the President's budget has been submitted to Congress, the Commission is pleased to give opinions on Congressional inquiries as to the adequacy of particular appropriations requests.

C–(2) It has been suggested that regulatory agencies can never be truly independent if they must clear budgets and legislative proposals through OMB. Do you agree?

Response: The Commission is required by law to clear its budget through OMB. The Commission is under no statutory constraint to deal with OMB in legislative matters, even though it does voluntarily coordinate its legislative matters with that agency. As described in the response to C–(1), the Commission believes that these practices do not detract in any significant way from the independence of the FTC.

C–(3) Do you believe that regulatory agencies consciously or unconsciously submit lower budget figures than they really believe that they need simply because they know that higher figures would not pass OMB scrutiny?

Response: The Commission develops budget requests on the basis of many factors. Foremost is its estimates of needs to carry out its mandates under law. Omnipresent is our concern for the taxpayer. Finally, our budget requests attempt to respond in a very general way to the requirements of fiscal policy as we understand them.

C–(4) What effects do you believe direct submission to Congress of budgets and legislative proposals would have on the independence of regulatory agencies, as in the case with the Consumer Product Safety Commission?

Response: The Commission already submits legislative proposals directly to Congress, although prior to submission it is willing to consider the informed viewpoints of other agencies including OMB. We do not believe that the direct submission to Congress of budgets would have any effect on the Commission since we can and do give Congress all the information it wants concerning our needs after the submission of the President's budget.

D. USE OF INJUNCTIONS

(1) The power to seek injunctions under Section 13(b) of the FTC Act has been attempted only six times since 1973 when it was enacted by Congress. Do

you believe that the Federal courts have interpreted this power in a manner which is consistent with the Congressional intent?

Response: There have not been enough court decisions as yet to be able to discern any distinct pattern as to how the courts will react. The indication is, however, that the courts will be very careful about issuing preliminary injunctions especially where only monetary injury is claimed, and the effect might be to substantially disrupt an ongoing business by requiring it to abandon practices that have not yet been held unlawful.

The only reported decisions which have interpreted 13(b) are *FTC* v. *British Oxygen Co. Ltd.* CCH 1976–1 Trade Cases ¶ 60,697 (3d Cir. 1976) and *FTC* v. *Simcon Management Corp.*, 391 F. Supp. 697 (N.D. Cal. 1975), *aff'd*, 1976–1 Trade Cases ¶ 60,777 (9th Cir. 1976). In *British Oxygen Co.*, an injunction issued by the district court to stop a friendly takeover by British Oxygen of Airco, Inc., prohibited BOC from exercising any control over Airco, and the two companies from taking any steps to effectuate a merger between them. The court of appeals reversed one paragraph of the injunction as it applied to Airco, relying on a very narrow ground which does not affect the Commission's authority under Section 13(b).

The Ninth Circuit in *Simeon* interpreted Section 13(b) as approximating the traditional equitable standard. As such, we do not believe it is consistent with the Congressional intent, since the legislative history expressly disavowed any such standard.

As a practical matter, the Commission has only been successful in obtaining injunctions under 13(b) where it has been shown that the public health has been endangered (*e.g., Travel King*) or where the Commission might not be able to order future effective relief (*e.g., British Oxygen Co.*). Where purely monetary injury has been alleged (*e.g., Idea Research and Development*), the Commission has not been generally successful, and this is probably the type of case which the courts will scrutinize most closely. The Commission was able to settle another case (*United Builders, Inc.*), involving monetary injury on favorable terms. The sixth case, however, *Coventry Builders, Inc.*, has been pending since April 1975, and the district court has allowed respondent to have discovery which has been responsible in large part for the delay.

(2) In *FTC* v. *Simeon Management Corp.* both the Federal District Court and the 9th Circuit Court of Appeals appeared to interpret Section 13(b) as requiring a traditional equity standard for an injunction. Do you believe that this standard would make it more difficult to use injunctions in many FTC matters?

Response: The traditional standard applicable to a preliminary injunction definitely would make it more difficult for the Commission to obtain injunctions than we think Congress intended.

The Ninth Circuit itself in passing on injunctions under the National Labor Relations Act has laid down the proper standard. In *Kennedy* v. *Los Angeles Typographical Union No. 174*. 418 F. 2d 6, 8 (9th Cir. 1969), the court stated:

As this court said in San Francisco-Oakland Newspaper Guild v. Kennedy, 412 F. 2d 541 (9th Cir. 1969), a preliminary injunction under § 10(1) should be granted "if the court finds that the factual allegations and the propositions of law underlying the regional director's petition are not insubstantial and frivolous so that he has reasonable cause for believing the Act has been violated, and if the court finds that injunctive relief is appropropriate."

Such a standard would give due recognition to the Commission's role as the fact finder and to its expertise in deciding what is unfair or deceptive. The equitable standard applied by the court in *Simeon* seems to impose a heavier burden and to require that the Commission persuade a court that it is likely to succeed on the merits, rather than simply that the Commission's factual allegations and propositions of law are not insubstantial.

Perhaps in cases where the danger to the public is clearly shown, the difference in standards may not be too significant. Even under the traditional equitable standard, some courts have said that if the balance tips decidedly in favor of the party requesting the injunction (as it presumably would where the public health or safety is concerned), the court will require only that the issuing party show that he has raised a serious question going to the merits so as to make it a fair ground for litigation. See, *e.g., Gulf & Western Industries, Inc.* v. *The Great Atlantic & Pacific Tea Co., Inc.*, 476 F.2d 687, 692–93 (2d Cir. 1973).

(3) If the *Simeon* standard remains the interpretation of Section 13(b), would you intend to ask Congress for new statutory language to seek injunctions under a standard different from the traditional equity standard?

Response: To the extent that courts develop a consistent pattern of requiring fulfillment of the traditional equity tests, Congress may well wish to consider clarifying legislation. The Commission would support such a review. We should note that *Simeon* also applied the same standard to the Commission's right to injunctive relief under Section 13(a), concerning false advertising of food and drugs. If the *Simeon* standard is adhered to under either subsection, Congressional action would be appropriate.

(4) Do you believe that injunctions would be useful in areas other than health and safety areas, for example, where the economic loss to consumers would be great and where the possibility of restitution later is small?

Response: Injunctions could be useful in such areas. They would also be useful to stop false advertising which is likely to be of only a short duration, and where the fruits of the deception would be realized before the Commission's order becomes final. As demonstrated by *British Oxygen Co.*, 13(b) can also be a valuable tool in preventing the consummation of mergers.

E. READABILITY OF RULES

E-(1) It has been suggested that the Commission's regulations are too complicated to be understood by many consumers and that this lessens their impact. What is the Commission's policy with respect to readability?

Response: E-(1) The Commission believes it is essential that its trade regulation rules and required disclosures be easy to read and to understand. The easier such regulations are to comprehend the easier it will be for the affected party to comply. Ease of comprehension has the added benefit of reducing the amount of time Commission staff must spend in answering inquiries concerning what the regulations require. Moreover, many of the Commission's rules require some specific written disclosures to consumers which can only be effective if they are easy to read and to understand.

To this end, the Bureau of Consumer Protection has hired, on a consultancy basis Dr. Rudolf Flesch, an expert in readability studies. The Bureau has also instituted a policy requiring all rules and disclosure notices to meet an objective measure of "readability" as measured by a test developed by Dr. Flesch. Rules which affect small businessmen will be required to rank at no more than the "standard" level of readability as measured by the Flesch test. Disclosure notices to consumers will be required to rank at no more than the "easy" level of readability.

E-(2) Has the Commission done any studies of older rules and guides to determine whether they are being understood by the public?

Response: E-(2) Dr. Flesch has analyzed various rules and currently required disclosure notices and has determined that they range from the "standard" level of readability to the "extremely difficult" level. It is these analyses that have convinced the Bureau of Consumer Protection that adoption of the above-discussed policy is instrumental.

E-(3) Is there any procedure whereby rules and guides are reviewed for readability and updating?

Response: E-(3) The Bureau's policy of increasing the readability of rules and notices will be implemented using the following three part procedure:

A. All proposed rules affecting small businesses and all disclosure notices directed to consumers will be submitted to Dr. Flesch who will work with the staff to edit the rules so that they meet the objective standards set forth above.

B. The Division of Evaluaion will have responsibility to insure that those objective criteria have been met.

C. Already published rules and notices will be submitted to Dr. Flesch and to the Division of Evaluation for review to determine if they should be amended to incorporate more readable disclosure notices.

The Commission is currently re-evaluating its outsanding trade practice rules (TPRs). The goal of this program has been to identify and rescind those TPRs which serve no useful purpose and to amend those which do accomplish a significant advisory objective but which may be out-of-date.

Of the first 61 TPRs which were proposed for rescission, 56 have been rescinded by the Commission and eliminated from the Code of Federal Regulations. An additional 50 TPRs are currently being proposed for rescission with an additional 40 likely to be proposed later this year.

F. LINE-OF-BUSINESS PROGRAM

F–(1) In light of the intense litigation concerning this program, when might the FTC expect to receive full compliance with the 1974 form?

Response: F–(1) It is always difficult to predict the end of litigation, especially when the opposing parties are numerous and have the incentive to litigate. Nevertheless, having recently secured court orders transferring to and consolidating in one court all of the LB litigation pending in different courts, we are now in a position to seek a prompt disposition on the merits. We think it reasonable to anticipate that we will have a final decision at the district court level before the end of the year. The further duration of the litigation will depend upon such matters as the nature of the district court's rulings whether and to what extent appeals are pursued, and whether stays pending appeal are granted. In any event litigation at the court of appeals stage should not take more than a year. If the case were to go to the Supreme Court for plenary consideration on the merits, an additional year would probably be required. In sum, it is possible that we will not receive full compliance with the 1974 LB orders until 1978. Nevertheless, we are hopeful that a much sooner resolution is obtained.

F–(2) Is the time lag caused by this litigation a significant factor in judging the usefulness of the data once it is compiled?

Response: F–(2) It is difficult to characterize the significance of the effect of the time lag on the usefulness of the LB data once it is fully compiled. Obviously, the full array of data to be derived for 1974 will be somewhat less useful in 1978 than it would be if available in 1976, since there will be *pro tanto* a diminished opportunity for the data to be the basis of current judgments about ongoing policy for the intervening years. However, we do not believe that the mere "age" of the data will make it of merely academic interest. The 1974 data, especially when coupled with data for subsequent years, will provide an important element in a series of reports and analyses revealing changes over time. Since the LB data will be incomparably richer and more detailed than any other available data, the 1974 data would be highly valuable even if none of them were available until the conclusion of the litigation.

In fact, however the great bulk of the LB data is already available to the Commission's Division of Financial Statistics, since the majority of the companies have already filed the 1974 LB reports. Based on the preliminary analyses that the Commission's LB team has made of the 1973 LB data, we think that the data already available from the 1974 LB reports on hand will be fairly representative of the data for the entire survey, and it may well be possible to prepare useful interim reports even if the final reports based on all the 1974 LB data are delayed pending the outcome of the litigation.

G. DESIGNATION OF ISSUES FOR CROSS-EXAMINATION UNDER SECTION 202(C)(1)(B) OF THE MAGNUSON-MOSS ACT

G–(1) Does the broad scope of regulation 16 C.F.R. Section 1.13(d)(1)(ii) conform with the limited nature of the issues that Congress desired should be designated for cross-examination?

G–(2) What purpose does this regulation serve?

G–(3) Does the broad language of this regulation allow presiding officers to designate issues which are not subject to bona fide dispute?

G–(4) Does the varying approach to this question by the presiding officers in different rulemaking procedures indicate a lack of clear guidance from the regulations?

G–(5) Does the action of presiding officers such as in the Vocational School rulemaking proceeding indicate that the officers are bringing elements of adjudicatory procedure into rulemaking?

G–(6) Does Section 1.13(d)(1)(i) adequately describe the full range of issues which may be designated for cross-examination?

Response: For convenience a composite response is submitted. The Commission believes that the types of issues described in 16 C.F.R. § 1.13(d)(1)(i) are the only issues that must be the subject of limited cross-examination under the Improvement Act. The purpose of § 1.13(d)(1)(ii) is to permit the presiding officer in his discretion to designate additional issues for limited cross-examination that do not meet the strict statutory standards. The Commission thereby recognizes that although the Improvement Act does not mandate cross-examination on such other issues, it certainly would permit it. Further, in view of the emerging case law in this area, particularly in the D.C. Circuit [1], cross-examination may be appropriate on certain other issues.

It is not, of course, intended that the presiding officer designate issues under § 1.13(d)(1)(ii) which are not the subject of a bona fide dispute. Nevertheless, since the designation of issues occurs at an early stage in the proceeding, § 1.13(d)(1)(ii) permits him to designate an issue without the necessity of holding a separate hearing or calling for additional comments on the question of whether a bona fide dispute exists.

The Commission recognizes that different rulemaking proceedings may benefit from the application of different procedures, including the designation of different types of issues for limited cross-examination. Rather than being a result of a lack of guidance from the Commission, it is a recognition of the fact that the range of issues raised in vastly different rulemaking proceedings should be dealt with by specific procedures tailored for each rule.

The Vocational Schools Rule, on which hearings have recently been concluded, will soon be before the Commission pursuant to rule 1.14. The Commission will then have the opportunity to review all of the actions of the presiding officer in conducting that proceeding. At this point the Commission has not determined what form, if any, of rule to promulgate, and has not ruled on any of the objections that interested persons have raised to the presiding officer's conduct in the proceeding. The Commission, therefore, believes that it would be inappropriate to comment on the presiding officer's determinations at this time.

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[1] *Mobil Oil* v. *F.P.C.*; *Walter Holm* v. *Hardin*; *International Harvester* v. *Ruckelshaus*.

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